Before the
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

In the Matter of:		
Expedited Consideration for Declaratory Rulings	)	
On the transfer of traffic only under AT&T	)	
Tariff Section 2.1.8., and Related Issues.	)	
	)	
Primary Jurisdiction Referral	)	
from the NJ District Court	)	
.	)	CCB/CPD 96-20
	)	DA – 06-2360
	)	WC Docket No. 06-210
One Stop Financial, Inc	)	
Group Discounts, Inc.	)	
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.	)	
Petitioners	)	
	)	
and	)	
AT&T Corp.	)	
Respondent	)	

FURTHER COMMENTS OF PETITIONERS REGARDING CONSOLIDATION AND EXTENSION

To FCC:
Marlene H. Dortch
Secretary
Federal Communications Commission
Office of the Secretary

Ms. Deena Shetler
Via ECFS and email:
Deena.Shetler@fcc.gov

Representing: One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. and
Winback & Conserve Program, Inc (The Inga Companies)

Its president

Al Inga

Jan 8th 2007

Dear Ms. Shelter

1) The Inga companies feel obligated to respond to AT&T's Jan 5th nonsense. AT&T states that the District Courts referral is "perfectly clear" that Judge Bassler only wanted a traffic transfer issue referred. (see AT&T introduction).

2) Judge Bassler ordered:

> It is further ordered that plaintiffs, no later than August 1, 2006, file an appropriate proceeding under Part I of the FCC's rules to initiate an administrative proceeding to resolve the issue of precisely which obligations should have been transferred under Section 2.1.8 of Tariff No. 2 **as well as any other issues left open** by the D.C. Circuit's Opinion in AT&T Corp. v. Federal Communications Commission, 394 F.3d 933 (D.C. Cir. 2005). [1] (exhibit A)

Does that sound like a perfectly clear stance that the Judge does not want "any other issues left open" resolved? Does AT&T just think that the FCC can't read?

2) AT&T's position to the District Court was that all the issues were already before the FCC, and of course the issues were already before the FCC as Declaratory Rulings:

> **Plaintiffs made the same arguments to the FCC that they are now raising in this Court. Their prior submissions to the agency confirm that the issues they ask this Court to decide are all encompassed within this Court's primary jurisdictional referral.**
> **AT&T's May 22nd 2006 brief**.

[1] The August 1, 2006 date was extended to Oct.1st 2006 by subsequent order of Judge Bassler.

3) Imagine AT&T uses as an excuse not to further ask the District Court for guidance that a new Judge Wigenton, would in essence be too stupid to learn this case:

> A new judge would be wholly unfamiliar with the tortured history of the case.

I am sure AT&T would argue to Judge Wigenton that she's incapable of understanding this case. What is this rocket science? Judge Wigenton is respected as a brilliant Judge. Using AT&T rationale, petitioners should have never went back to the District Court after the DC Circuit because the original Judge Politan was replaced by Judge Bassler. Was Judge Bassler smart enough to learn the case? Maybe AT&T will advise the DC Circuit that since Judge John Roberts left to become Supreme Court Justice, the DC Court should not be a place to go either. AT&T's bizarre statement that the District Court could not learn this case is demeaning of the District Court. Even if it took Judge Wigenton a month to learn the case that would simply be another month AT&T goes without its comeuppance. So why should AT&T care about the delay?

4) AT&T continues at pages 2 that the only issue involved in the 2003 referral was the traffic transfer. AT&T conveniently forgets that the FCC Declaratory Ruling explained that the **190 end-users who complained of June 1996 shortfall charges were made a part of the FCC record. The shortfall issue is already before the FCC.**

5) AT&T claims that petitioners did not raise the June 1996 shortfall infliction issues with Judge Bassler. Nothing can be further from the truth! There are **dozens**

of pages that were devoted to the pre June 17th 1994 issue, section 2.5.7, illegal billing remedy, discrimination etc. Attached as **Exhibit A through E** are the filings made by petitioners to the District Court that **conclusively show that petitioners raised all these non traffic transfer issues as well** to Judge Bassler that petitioners now seek the FCC to issue Declaratory Rulings on. We have bolded and increased the point size of the letters within these exhibits to easily see that all these issues were before Judge Bassler and he obviously intended all issues to be referred and resolved.

6) AT&T's gross misrepresentation that petitioners had an opportunity to argue 1996 shortfall infliction issues and didn't is utter nonsense. AT&T incredibly claims petitioners actually abandoned these claims!!! How can AT&T keep making up these deliberate lies when the evidence is so clearly against it? Desperation? Maybe AT&T is hoping a Judge will not read the record and believe AT&T because they are simply AT&T? AT&T obviously believes that representing AT&T gives it the right to be con artists. When Judge Bassler referred the case to the FCC he wanted all issues resolved, including the shortfall issues that petitioners strongly argued for before Judge Bassler. There is a difference between client advocacy and sheer gross misrepresentation and AT&T counsel continues to step way over the line. The general public would never believe that AT&T would continually make gross misrepresentations to Federal Judges and the FCC. It is beyond belief. Notice how AT&T counsel David Carpenter is no longer on this case. Mr. Carpenter spilled the beans before the Third Circuit and DC Circuit that S&T don't transfer on traffic only transfers, and AT&T took him off the case despite his firm Sidley Austin is still involved.

7) On page 4 AT&T claims that that since petitioners claimed that the Jan. 1995 traffic transfer issue was separate and distinct from the June 1996 shortfall infliction issue that this stance undercut petitioner's judicial economy position for resolving both issues. AT&T nonsense! The two issues are separate and distinct, **however the law that the FCC should be interpreting directly affects both issues.** For instance if it is determined that AT&T should have allowed petitioners to restructure its pre June 17th 1994 CSTPII/RVPP plans for a three year minimum it addresses two issues: 1) AT&T's Jan 5th 2007 comments still take the position that it can argue its fraud provisions. AT&T argued that it held up the traffic transfer due to the fact that it was a certainly that the CSTPII/RVPP plans would have gone into shortfall. Since the pre June 17th 1994 issue is 6 months prior to the June 1995 traffic transfer, AT&T should have known that it could have never relied upon its fraud statute to deny the traffic transfer because the plans were immune for shortfall. 2) Of course the pre June 17th 1994 rule relates to the June 1996 shortfall issue because AT&T did not wait until the grandfathered 3 year plans ended to inflict shortfall. AT&T the very minimum petitioners were able to restructure under the old rules through May 1997; 3 years after the June 17th , 1994 ruling. The point here is that this is just one example how the FCC has two separate and distinct issues however the interpretation of the tariff may affect both issues.

8) AT&T again attempts to mix apples and oranges regarding what petitioner's statements were to AT&T regarding what would be included within the Declaratory Ruling. Petitioners were not inquiring with AT&T whether these issues were to be

adjudicated or not before the FCC. The petitioners were confirming with AT&T that the issues were to be decided by the Declaratory Ruling process **AS OPPOSED TO A FORMAL COMPLAINT!** Petitioners were advised by the FCC's Mr. De Laurentis that it should confirm with AT&T whether the issues were to be resolved by Declaratory Ruling or Formal complaint. Judge Basslers referral gave petitioners sole discretion whether to use the formal complaint process or the Declaratory Ruling process, however Mr De Laurentis still advised that petitioners should confirm that the Declaratory Ruling process was acceptable. AT&T acts like petitioners were asking AT&T what it could be charged with, as if petitioners would listen.

9) Petitioners knew AT&T would be up to its usual tricks once it was before the FCC. AT&T had just strongly stated to the District Court that all these issues have been before the FCC before and none are disputed facts. AT&T counsel Mr. Brown now comes up with statements like "Well the underlying facts are disputed." Wow we have a new classification of facts. Underlying facts. So AT&T counsel says he wasn't lying to the District Court about "no facts being disputed", he just wasn't taking about the underlying facts. This case has become an AT&T comedy routine. Abbot and Costello's--- "Who On First" routine is less confusing.

10) On page 6 of AT&T's Jan. 5th 2007 comedy routine, it states:

> In a desperate attempt to expand the scope of the referral petitioners discuss a **July 2005** email ostensibly from FCC counsel Austin Schlick to petitioners' president…."

How could petitioners seek to expand the referral by using Mr. Schlicks, July 2005 statements when the District Court referral came in 2006? The point that

petitioners were making which is the same point FCC Counsel Schlick both wrote and explained to petitioners is that petitioners could ask the FCC for whatever Declaratory Rulings it wanted, whether the issues were referred by the District Court or not. There is no such rule that citizens of the USA first have to get a primary jurisdictional referral from a District Court prior to filing a Declaratory Ruling request. Here the rulings that petitioners would have filed anyway were referred anyway by the District Court. AT&T's ridiculous statements that the FCC's Mr. Schlick has no authority to expand the District Courts referral is comical. Mr. Schlick made the correct statement prior to the District Court referral.

11) AT&T simply can not stop its gross misrepresentations. The more nonsense it gives out the more it boomerangs back at them. AT&T should have learned a long time ago that trying to get its nonsense passed the Inga Companies was not going to be as easy as it was with all the other aggregators which AT&T either paid paltry hush money to, or simply put out of business with no repercussions to AT&T. AT&T should have learned by now: "Oh what tangled web we weave, when it is our intentions to deceive"; however AT&T

12) On page 6 AT&T again misrepresents petitioners and the taxing authorities' interests. AT&T in fact states that petitioners' statements are unsupported. **The FCC and AT&T have been given a copy of Florida's senior counsels' statements that Florida "is of course interested in the FCC decision."**

13) The mere fact that both the IRS and Florida's tax evasion cases are still active makes AT&T's statement that it was already audited and the case was closed another gross misrepresentation by AT&T. Obviously AT&T was either not audited or if it was audited it wasn't on these tax issues.

14) The IRS and Florida have told Tips Marketing Services Corp that if there had been an audit on these issues and the case was resolved it would have thrown out the tax reward applications a long time ago. The tax rewards applications were filed two years ago. The IRS and Florida have already done extensive research and are waiting to see whether the shortfall is permissible in the first place, and if the charges are permissible (in Florida's case) how much revenue is attributed to the state of Florida. Florida and the IRS do not have to make comments to have their interests protected. Both taxing authorities are carefully taking in all the information and will jump quickly on AT&T when its time.

14) It is also quite comical that AT&T is telling the FCC to pay no attention to unsupported statements. AT&T is claiming that it has done tens of thousands of traffic only transfers under section 2.1.8 and all resulted in the shortfall and termination obligations transferring; however it is AT&T which offers no support of its ridiculous theory.

15) AT&T states that CCI has no say in this matter, AT&T again is wrong. The Supreme Court of Florida, CCI domiciled state as written opinions where CCI can return to the case if it is shown that AT&T used its bogus shortfall charges to induce CCI to enter into the settlement agreement. One of the remedies under fraud in the inducement is to have the case reinstated as to CCI. Additionally AT&T agreed that CCI was damaged and AT&T has already agreed that part of the value afforded CCI was not paying AT&T shortfall charges; therefore if the shortfall is determined bogus, AT&T would have to replace with real dollars the bogus value it already agreed it owed CCI. CCI obviously has tremendous interest in this case despite AT&T's rhetoric.

11) AT&T also totally misreads 800 Services, Inc's very well written comments that show with several FCC statements within the 2003 Declaratory Ruling, regarding why all issues have to be addressed. What happened to 800 Services, Inc. in its case with AT&T is not only totally irrelevant but should never have occurred if that case went to the FCC, which it did not. Additionally that case would have been totally different if Mr. Inga was there to assist 800 Services. 800 Services, Inc.'s, comments simply destroyed AT&T's arguments and AT&T had no comment other than—"You know we sued them and they never paid us." Sound like a 3rd grader arguing. That's really clever AT&T! From $500 an hour counsel you would expect better; then again look what they are working with- nothing! Both the facts and the law are against AT&T. AT&T just has the money to con and waste everyone's time, as it plays the FCC for fools.

12) The most comical statement out of AT&T entire brief has to be this one on page 7:

> Now that they have been ordered to return to the commission petitioners propose **to cause further delay** by returning to a new District Judge (Judge Bassler has retired) who is completely unfamiliar with the convoluted history of this case, and raising new issues that they abandoned before Judge Bassler .Granting petitioners request will unfairly burden AT&T and the new District Judge and **cause further delays in the proceeding.**

AT&T's solution of course for not causing further delay is to "not resolve any of the shortfall infliction issues that were referred by the District Court. This way we can have even further delay by resolving the traffic transfer issue now than AT&T will come up with some other creative reason why the shortfall issues can't be resolved.

AT&T's statement if not for the years of injustice to petitioners would be funny but at this point petitioners are more than fed up with this absolute nonsense.

13) Additionally, AT&T also conveniently forgets to address the fact that magistrate Ronald Hedges stayed the 1997 Supplemental complaint (dealing with the June of 1996 imposition of shortfall and termination charges) along with the traffic transfer issue treating it as a related issue. Petitioners submitted multiple briefs to the District Court seeking to separate the Jan 1995 traffic transfer issue from the June 1996 S&T charges infliction on end-users. However Judge Bassler was unwilling to separate the issues. Therefore issues relating to both the Jan 1995 traffic transfer issue and the June 1996 S&T charges infliction must be interpreted.

The Inga Companies respectfully request that the FCC

1) Address all Declaratory Ruling Requests

2) Consolidate both the Inga Companies petition with Tips Marketing Companies petition, and

3) Extend the Inga Companies reply comments date to February 16th 2007 whether the FCC wishes District Court guidance or not.

Exhibit A

Alfonse G. Inga
PO Box 1234
Little Falls, NJ 07424
ph.973 787 1050
fax: 973 7871050
Email: ajdmm@optonline.net

July 9, 2004

William T. Walsh
Clerk of US District Court
United States District Court
Martin Luther King, Jr. Federal Bldg.
& U.S. Court House
50 Walnut Street
Newark, New Jersey 07101

Hon. William G. Bassler, U.S.D.J.
United States District Court
Martin Luther King, Jr. Federal Bldg.
& U.S. Court House
50 Walnut Street
Newark, New Jersey 07101

Re: Request for Hearing on March 1997 Supplemental Complaint
OR
Primary Jurisdiction Referral Order to obtain a Declaratory Ruling regarding
March 1997 Supplemental Complaint
Combined Companies, Inc., et al v. AT&T CORP
Civil Action No.:95-cv-00908-WGB

Your Honor:

I approach this Court Pro Se as President of plaintiffs One Stop Financial, Inc., Winback & Conserve Program, Inc., Group Discounts, Inc. and 800 Discounts, Inc. (collectively, "plaintiffs" or "the Inga Companies") I would enjoy nothing more than to be represented by competent counsel but I simply can not afford it.

Your Honor is already aware of the initial Inga Companies damage complaint against AT&T that the DC Court of Appeals is currently reviewing. That complaint found AT&T had unlawfully denied the phone accounts to be moved from the 28% CSTPIIRVPP discount plan to a 66% discount plan in January 1995.

Your Honor preferred to wait for Judicial Review by the DC Court of Appeals on this issue before a damage hearing could start before Your Honor. November 12th 2004 has been set as date for oral argument regarding that issue.

Separate and Distinct Issues than the Account Movement Issue

I am herein addressing a Supplemental Complaint filed in March of 1997. The new complaint is separate and distinct from what is before the DC Court of Appeals on Judicial Review. The Inga Companies additional claims are valid no matter what the outcome is of the DC Court of Appeals Judicial Review; therefore this is not a waste of the Courts time.

A Supplemental Complaint was filed in March of 1997 in large part due to AT&T's infliction of shortfall penalties in June of 1996. These were the accounts that remained on the 28% discount plan after AT&T was unlawfully found to have denied their movement to the 66% discount plan in Jan. 1995. **Therefore the second separate and distinct illegal remedy occurred 18 months after the first illegal remedy. (Jan. '95- June '96)**

This Court under Judge Politan has **already heard substantial testimony on the shortfall issue during the hearing on account movement.** However, the case before Judge Politan dealt solely with the separate and distinct issue of account movement.

There was not a separate decision from Judge Politan regarding the validity of the shortfall penalties. **Additionally, there was no decision as to whether the step by step procedural application of the penalties mandated by AT&T's tariff was adhered to by AT&T, which would result in an illegal remedy by AT&T if not followed.**

Illegal Remedy Complaint Addressed Now.
The Validity of the Shortfall Penalties may be Addressed Later

While we will deal with the validity of these shortfall penalties later, it is important for Your Honor to know Judge Politan had the following to say in his Opinion regarding the validity of these shortfall penalties.

"Suffice it to say that, with regard to pre-June, 1994 plans, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff." (Letter Opinion at p. 11 ¶ 1).

Judge Politan also stated **"In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do escape termination and also shortfall charges through renegotiating their plans with AT&T."** (Letter Opinion at p. 24 ¶ 1,)

Your Honor, it is fact that these plans were all indeed established prior to June 1994 as the FCC also agrees:

The FCC States these Plans were Pre June 17th 1994 Plans

The FCC found that these plans were all Pre-June 1994 plans. (FCC October 17th 2003 Declaratory Ruling Decision at ¶ 2).

The FCC again noted that these plans were ordered prior to June 1994 in its response brief to AT&T before the DC Court of Appeals (p4 ¶ 1) May 2004.

AT&T Business Executives stated that the Shortfall Penalties were Not Valid

Irrefutable evidence was also presented to Judge Politan that 13 AT&T managers were lawfully audio taped and stated that the tariff dictates that there should be no shortfall penalties imposed on the CSTPII/RVPP plans. The Court required my Company to provide AT&T with the audio tapes, which was done.

After extensive testimony, Judge Politan didn't need to refer this separate and distinct shortfall validity issue to the FCC, as he referred the movement of the accounts issue. Judge Politan obviously was more than satisfied that these plans were immune from shortfall penalties due to the plans being established prior to **June 17th of 1994,** or he would have obviously asked for FCC guidance.

While clearly I would prevail in a decision on the validity of the shortfall, I will leave the shortfall validity hearing for another day as it will not be needed if the illegal remedy complaint is won.

What I am Requesting Your Honor to address now is AT&T's Illegal Remedies Used in Applying the Shortfall Penalties if AT&T Believed the Penalties were Valid.

I would prefer that this illegal remedy complaint be decided in Court.

Because AT&T put all the toll free aggregators out of business many years ago and the CSTPII/RVPP plans are no longer in existence in the market, there is no chance for conflicting opinions.

Additionally, since this is black letter law and a recent precedent has just been established with the same two parties regarding illegal remedies. It is more than justifiable to have it heard within the Federal District Court, before Your Honor.

It took 7 years to get a decision from the FCC on the last Declaratory Ruling. However, if Your Honor believes that this complaint should be resolved at the FCC, it can be handled using the Declaratory Ruling process. I would then require a Primary Jurisdiction Referral Order from your Court.

Illegal Remedy of Applying Alleged Shortfall Penalties

Even assuming that AT&T can eventually convince this Court or the FCC that the shortfall penalties were valid, **AT&T's loses the March 1997 Supplemental Complaint due to its' illegal tariff remedy.**

If AT&T believed its shortfall penalties were valid, AT&T was, as the FCC has said, constrained by the remedy defined within its' tariff in applying the penalties.

It is an undisputed fact that AT&T initially applied the penalties against all of the end-users bills instead of AT&T's Customers (aggregators') single main billed account. This was a clear illegal remedy. Tens of millions of dollars were put on the end-users bills which resulted in an end to my business.

It was an illegal remedy to initially place the charges on the end-users bills instead of the AT&T's Customer (aggregator). In addition it was also an illegal remedy to apply shortfall penalties against the end-users in excess of the end-users discounts afforded by the aggregators' CSTPII/RVPP plan.

FCC's Position on Illegal Remedies

The FCC's position on illegal remedies is clear as we have just witnessed in the FCC's Oct. 17th 2003 ruling against AT&T in the account movement case. In that case, AT&T violated its tariff by also using another illegal remedy.

The FCC states in its Oct 17th 2003 Declaratory Ruling:" We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus can not rely upon the fraud sections of its tariff to justify its refusal to move the traffic. Accordingly, we conclude that AT&T's action in refusing to move the traffic was unlawful and violated subsection 203(c) of the Communications Act. (Oct 17th 2003 p. 14 ¶ 21 Conclusion)

The FCC further stated in its recent filing to the DC Court of Appeals: "In essence, the Commission ruled that AT&T had invoked a remedy other than the ones authorized under its tariff. But the terms of the tariff define and constrain AT&T's conduct and specify the remedies available to the company in connection with its provision of tariffed services. *See AT&T v. Central Office Telephone Co., 524 U.S. at 222-24.* As this Court (DC Court) recently noted, "filed tariffs are pointless if the carrier can depart from them at will. Orloff, 352 F.3d at 421. Condoning AT&T's departure in this case from the remedial terms of its tariff would "undermine the regulatory scheme" and give AT&T the power to control the economic fates of its customers here, the resellers. The Commission's holding on this issue thus is both consistent with the law and reasonable."

Your Honor, it is clear, AT&T again did not avail itself of the remedy defined in its tariff for applying shortfall penalties.

If it is found that an illegal remedy was used by AT&T in applying the shortfall penalties there would be no need to pursue whether the shortfall penalties were valid, because the FCC position would dictate that AT&T could no longer rely on the shortfall penalties.

AT&T Tariff 2 at 3.3.1 Q

The tariff states:
"-The Customer will assume all financial responsibility for all designated accounts in the plan and will be liable for all charges incurred by each location under the plan."

In Public Comments to the FCC last year, AT&T emphatically declared that the aggregators' end-users are not AT&T customers. These end-users are the customers of the aggregator. The aggregator is AT&T's Customer not the end-user. The shortfall charges should not have been placed on the end-users bills. The Customer (aggregator) is responsible for the shortfall charges if valid.

AT&T was constrained by its tariff to initially apply the shortfall penalties against its customer, the aggregator. If the aggregator could not pay the bill AT&T could subsequently only remove the discounts on the end-users bills that the aggregator had afforded these end-users.

The tariff continues:

"In the event that a location is in default of payment, AT&T will seek payment from the Customer. If the Customer fails to make payment for the location in default of payment, AT&T will: (1) reduce the discount by the amount of the billed charges not paid by that location, if any, and apportion the remaining discount, if any, to all locations not in default, and if payment is not fully collected by the above method, (2) terminate the RVPP/CSTPII for failure of the Customer to pay the defaulted payment."

Again payment comes from the Customer (aggregator) not the end-user. Also, AT&T never terminated the CSTPII/RVPP plan in question in accordance with the tariff.

The tariff continues:

"-Shortfall and or termination liability are the responsibility of the Customer." Again, AT&T admitted to the FCC in its' Public Comments filed in 2003 with the FCC that the end-users of the aggregator are not AT&T customers.

The tariff continues:

"For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan."

I have been told by R.L. Smith, the FCC's AT&T tariff expert, that AT&T was only permitted under its tariff to reduce the end-users discounts up the amount of discount provided by the aggregator, nothing more!

If there phone bill was $100 and the end-user location was receiving a $20 discount, AT&T was limited to reducing the $20 discount. What AT&T did was charge the $100 user over $1,000 in penalties. Business people went crazy, contacting their attorneys and every state and federal regulatory agency available.

It is obviously common sense that AT&T should have initially attempted to collect its alleged shortfall penalties from its Customer, the aggregator. AT&T however clearly wished to place the penalties on our end-users and ruin our relationship with our customers and destroy the grandfathered CSTPII/RVPP discount plan. First AT&T had to declare the shortfall penalties were valid, despite the opposite tariff interpretations of 13 AT&T managers audio taped. Clearly AT&T wanted me out of business.

Federal Law on Tariff Ambiguity—from the DC Court of Appeals Filing

The tariff citations stated above clearly show AT&T used an illegal remedy. The fact that 13 AT&T mangers also interpreted the tariff as the Inga Companies did and thus believed the plans were immune from shortfall shows the tariff was at least ambiguous.
If the tariff was viewed as ambiguous it must be ruled, by law, against AT&T.

FCC stated in May 2004:
"On the other hand, where "the usual canons and techniques of interpretation leave real uncertainty" regarding a tariffs application, the Commission properly construes the tariff "strictly against the carrier" and resolves "any doubt in favor of the Customer." *Associated Press* v.FCC. 452 F.2d 1290. 1299 (D.C. Cir.1971) *See Associated Press Request for Declaratory Ruling*, 72 FCC 2d 760, 764-65 (para.11) (1979); Commodity News *Services, Inc. v. Western Union,* 29 FCC 1208, 1213 (para.3) *aff'd,* 29 FCC 1205 (1960).

If Your Honor will not address the Illegal Remedy Complaints in Court, the Venue for Resolution of the Illegal Remedy is the Declaratory Ruling Process at the FCC.

In accordance with the FCC's rules on Declaratory Rulings the relevant part being 1.2; "The Commission may on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

The applying of shortfall charges by AT&T to my end-users and resulting in the end of my business was obviously controversial. It ended my business and caused mass hysteria from tens of thousands of business people. Uncertainty in the tariff of course arises over whether AT&T could use the remedy it did to end my business.

I have had multiple conversations with FCC staff regarding procedural avenues available to determine if AT&T's application of shortfall penalties was an illegal remedy under AT&T Tariff 2. The FCC staff has stated that the declaratory ruling process is indeed an appropriate and available avenue for resolution of whether an illegal remedy was applied by AT&T.

Additional Illegal Remedy- AT&T Tariff 2 Section 2.5.7

AT&T also did not adhere to its tariff in reference to AT&T Tariff 2 Section 2.5.7 which Waives Shortfall Penalties Due to Circumstances Beyond the Customers Control. This tariff section was timely requested and AT&T gave no reason why this tariff section would not apply.

AT&T Ended Up Waiving All Shortfall Penalties Anyway

AT&T stated in a letter to Your Honor in its letter of Jan 30th, 2004 that it waived all shortfall charges and termination penalties back in 1997 when it paid off my former co-plaintiff Combined Companies, Inc. (CCI)

AT&T's waiving all penalties obviously means it can't raise the shortfall penalties as an offset to the damages it owes the Inga Companies even if these alleged penalties were found legitimate. However, a Court Decision regarding illegal remedies is needed because there are separate and distinct additional damages suffered from AT&T's inflicting these shortfall penalties.

My relationship with my customers was irrevocably destroyed and the grandfathered CSTPII/RVPP plan that had special grandfathered rights was destroyed. These are just two of the several damage issues that have nothing to do with the account movement issue before the DC Court.

Even if AT&T prevails and overturns the FCC decision on the separate and distinct account movement issue then there are additional damages for loss of income that are applicable on the accounts that had remained on the grandfathered CSTPII/RVPP plan.

The Penalties Inflicted on my Customers were Not a Mistake by AT&T

It was a calculated decision that was evaluated over months. AT&T's senior attorney Charles Fash stated that the alleged shortfall penalty period had completed gestation 3 months before the penalties were applied. This is normal as the RVPP discount which carries the penalties lags months behind CSTP discount. AT&T had 3 months to evaluate that what it was doing was in agreement with its tariff.

AT&T placed the penalties on the end-users bills, and AT&T then blamed the shortfall on the aggregator. The public screamed over phone bills that were 10 times higher than normal.

AT&T then threatened our customers to pay the AT&T phone bill or their toll free phone lines would be disconnected! Since these toll free lines were used for sales and customer service calls, this threatened the very existence of their business. My business was intentionally destroyed immediately by AT&T, who wanted me out of business and was willing to engage in multiple illegal remedies to do so.

AT&T's own reports showed that my companies controlled over 25% of all aggregated toll free business, of an industry with 100 competitors. I was by far the largest aggregator and this obviously made my companies a constant target for harassment and unlawful remedies by AT&T.

AT&T's Intentional Lies to The Federal District Court

AT&T in house senior counsel Edward Barillari and Pitney Hardin Counsel Richard Brown intentionally lied to this Court in the Jan 30th 2004 letter to Your Honor. Mr. Barillari and Mr. Brown have been provided the evidence that each knowingly and intentionally lied to Your Honor. Additionally, Judge Politan has already admonished another Pitney Hardin counsel due to his lies to this Court.

Additionally, it was no mistake by AT&T that it did not provide Your Honor with the settlement agreement between AT&T and CCI which AT&T quoted from in its Jan. 30th letter to Your Honor, but failed to disclose it.

It is my guess that if this settlement agreement is disclosed to Your Honor, you will discover additional intentional lies to this Court when compared to the representations made by Pitney Hardin's Mr. Richard Brown in his letter to Your Honor on Jan. 30th 2004.

AT&T in house and outside counsel have become so desperate that each is now willing to engage in intentional lies to an experienced Federal Judge. If Your Honor wishes I can provide irrefutable evidence that both attorneys knowingly lied to Your Honor.

More than a Tacit Admission of Guilt by AT&T.

AT&T Provided a $50 million+ Compensation Package to CCI that provided cash, waiver of shortfall penalties, and dropping of additional complaints:

1) under a strict non disclosure agreement.
2) years before the FCC even issued its Declaratory Ruling,
3) which AT&T stated itself many times within its briefs, had little assets,
4) with a requirement that CCI's President continue to help AT&T defend itself against the Inga Companies.

Order for Primary Jurisdiction Referral

Your Honor it will be over 10 years since AT&T's first illegal remedy and still there has been no repercussions for that illegal action. While I have no doubt that the FCC would again unanimously rule in the Inga Companies favor, I do not believe I should wait 10 more years for an FCC decision. This is a clear cut matter that can be done in the Federal District Court with no possibility of conflicting opinions thanks to AT&T having put all the CSTPIIRVPP aggregators out of business many years ago.

Your Honor I wish to address AT&T's illegal remedies in a Court Hearing. However, if Your Honor believes this must be resolved by the FCC, to follow is a proposed Order for your modifications.

Respectfully Yours,
For the Inga Companies:

_____
Alfonse G. Inga Pres.

CC: Edward Barillari esq. AT&T

Court Order
Primary Jurisdiction Referral
Declaratory Ruling Request

To:

Federal Communications Commission (FCC)
445 12th Street South West
Markets Dispute Resolution Division
Attention: Alex Starr
Washington, DC 20554

The Court seeks a Declaratory Ruling regarding whether AT&T violated its Tariff 2 and thus The Communications Act at the time of June 1996.

The applicable discount plan at issue was CSTPII/RVPP that was subscribed to under AT&T Tariff 2.

The complaint deals with AT&T's remedy in applying shortfall penalties to its customers the Inga Companies who were aggregators and owners of the CSTPII/RVPP plans. The Court is not seeking guidance on whether the shortfall penalties inflicted by AT&T were valid; this is a different issue entirely that the FCC has stated should not be decided within the Declaratory Ruling Venue.

The issue is simply whether the proper methods, procedures, and proper step by step chronological remedy constraints mandated by the tariff were followed by AT&T in applying shortfall penalties. Specifically, how should the tariff be applied to these set of facts?

The undisputed facts are:

Declaratory Ruling One: Procedural Remedy of Applying Shortfall Penalties

AT&T initially applied all of its alleged shortfall penalties directly to the aggregators' end-user locations, in excess of the discounts being provided by the aggregator. End-users received phone bills with shortfall penalties 10 times greater than their actual phone charges.

AT&T then removed, all the charges off the end-user locations and put all shortfall penalties on the Aggregators single master account.

Declaratory Ruling Two: Disputed Bill Remedy

The validity of the charges was in dispute. The Aggregator never paid the shortfall charges as the aggregator disputed the charges were not valid, months before and months after the charges were inflicted by AT&T.

AT&T did not wait any additional time to apply the penalties that were in a billing dispute than the normal time period of applying charges to phone bills.

AT&T continued to bill the locations and did not temporarily or permanently suspend phone service to the locations that it continued to bill and collect phone charges.

Declaratory Ruling Three: Waiver of Shortfall Remedy

Section 2.5.7 Waives Shortfall Penalties Due To Circumstances beyond the Customers Control. The CSTPII/RVPP owners timely filed a request to waive shortfall penalties under this section 2.5.7 but AT&T applied the penalties anyway.

The Inga Companies followed up with a letter to AT&T counsel stating section 2.5.7 was never denied but AT&T inflicted the shortfall penalties anyway.

At issue is:

Did AT&T violate its Tariff and hence the Communications Act given the above set of facts.

Should AT&T have initially applied its shortfall penalties to AT&T's aggregators' customers i.e. the end-users phone billed locations?

Should the aggregators' customers (the end-users), be inflicted with shortfall penalties at all if it is determined that these end-users are not AT&T customers?

If the end-users are eligible under the tariff to receive penalties are the penalties limited to the amount of discount being afforded to the end-user location by the aggregator?

Was AT&T obligated to suspend service to the end-users that AT&T was billing on behalf of the aggregator when the aggregator did not pay the shortfall penalties demanded by AT&T?

Did AT&T apply the proper tariffed remedy for remedying phone billing disputes? The focus here is not whether the shortfall charges are actually valid; the focus is on AT&T's obligations when its Customer disputes a charge. The dispute of shortfall charges occurred before the charges were applied, and continued after the shortfall penalties were applied.

Should AT&T have granted a waiver of shortfall penalties due to circumstances beyond the customers control under section 2.5.7 given the fact that the request was timely filed and AT&T did not deny it the request?

Please provide Declaratory Rulings to the Federal District Court regarding whether AT&T violated its Tariff 2 and thus the Communications Act based upon the undisputed facts that are presented here and the additional facts that the parties will be present to the FCC.

William G. Bassler, U.S.D.J.
United States District Court
Martin Luther King, Jr. Federal Bldg.
& U.S. Court House
50 Walnut Street
Newark, New Jersey 07101

Primary Jurisdiction Referral Ordered this day July ___, 2004

_____
William G. Bassler U.S.D.J.

Exhibit B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation, and WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC., New Jersey corporations,	:	Civil Action No. 95-908 (WBG)

Plaintiffs, v. AT&T Corp., a New York corporation. Defendant.	:	**Return Date: June 30, 2005**

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO LIFT STAY

ARLEO & DONOHUE, L.L.C.
622 Eagle Rock Avenue
Penn Federal Building
West Orange, New Jersey 07052
(973) 736-8660 Fax (973) 736-1712
(FPA 0801)
Attorneys for Plaintiffs, Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc.

On the Brief:
Frank P. Arleo, Esq.

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PRELIMINARY STATEMENT

This law firm recently was retained as counsel for plaintiffs One Stop Financial, Inc., 800 Discounts, Inc., Winback & Conserve Program, Inc., Group Discounts, Inc. in this matter.[2] On behalf of plaintiffs, we respectfully submit this letter brief and Certification of Counsel in support of plaintiffs' motion to lift the stay imposed by this Court in 1996. Oral argument has been scheduled for June 30, 2005 at 10:00 a.m.[3]

This action was stayed in 1996 so that a very narrow issue of interpretation could be decided by the FCC under the doctrine of primary jurisdiction. As will be amply demonstrated herein, that issue has now been conclusively decided by the D.C. Circuit Court of Appeals and all proceedings before the FCC have been concluded. Hence, the stay should be lifted and this matter should proceed in this Court.

[2] Co-plaintiff Combined Companies, Inc. ("CCI") has settled its claims with AT&T and no longer is an active party in this litigation. Thus, all references to "plaintiffs" herein do not include CCI unless otherwise noted.

[3] Plaintiffs' prior counsel previously filed a motion to: (1) establish procedural time frames; and (2) schedule a conference in this matter. This motion is intended to supersede plaintiffs' prior motion.

BACKGROUND/PROCEDURAL HISTORY

1. Plaintiffs' Plans With AT&T

Plaintiffs were aggregators of inbound toll free service also referred to as Wide Area Telephone Service (WATS Service) or Toll Free Traffic, since 1989. Plaintiffs subscribed to AT&T's Customer Specific Term Plan II (CSTPII) which provided a 23% discount. Subscribers to CSTP II also had to subscribe to AT&T's Revenue Volume Pricing Plan (RVPP) which provided an additional discount of approximately 5%. Thus, plaintiffs had a total of 28% discount to share with its end-users.

AT&T continued to bill the end-users directly even though the end-user was under plaintiffs' 28% discount plan. Therefore, when enrolling end-user locations, plaintiffs had to advise AT&T how much of the 28% discount that it wished to give that end-user. Under AT&T's Enhanced Billing Option (EBO), there were four set discount levels of 15%, 17.5%, 20% and 23% provided to the end-user locations. The difference between what plaintiffs gave to the end-user and 28% would be the compensation paid by AT&T to the aggregator. For example, on all end-users who were given a 20% discount plaintiffs would make 8% of the end-users' phone bill traffic. Obviously, plaintiffs' market was comprised of only those companies that were small users of toll free service who would not be able to receive as much of a discount as plaintiffs were able to provide.

In a cottage industry comprised of roughly 100 competitors, plaintiffs were by far the largest aggregator in the county, controlling over 25% of the entire industry traffic under toll free aggregation. Unfortunately, this made plaintiffs a constant target of AT&T who resisted at every step the FCC mandate that AT&T's discount

plans be made available for aggregators' resale. The FCC sought to allow aggregation of AT&T's discount plans to create competition for the public's benefit.

During late 1993 and 1994, plaintiffs witnessed the emergence of several major competitors, one of which was Public Service Enterprises (PSE). PSE obtained a discount plan called Contract Tariff 516 (CT 516), which was essentially a CSTPII/RVPP plan of 28% with an extra 38% discount for a total discount of 66%. Under the CT516 plan, the end-user would receive a 28% discount and the CT516 owner would receive the 38% difference directly from AT&T to equal 66%. There were no different discount billing options under the CT-516 as with the CSTP/RVPP plan. The end-user locations received the 23% CSTPII discount and the 5% RVPP discount (28% total) and the aggregator got a supplemental compensation of another 38%. With the competitors offering their end-users 28% which was 5% more than the top 23% that plaintiffs could offer, plaintiffs simply could not compete. Additionally, the competitors were able to provide substantially more compensation to their sales people. Given the fact that AT&T still did the billing and it was the same AT&T network transmission facilities that were being utilized, plaintiffs simply could not keep its end-users or its independent contractor sales people from moving to a competitor.

2. <u>The Attempted Transfer</u>

Although plaintiffs qualified for their own CT, AT&T refused to provide plaintiffs with a Contract Tariff despite numerous written and verbal requests. In the fall of 1994, co-plaintiff Combined Companies Inc, (CCI) and plaintiffs entered into an agreement in anticipation of getting their own Contract Tariff (CT), as CCI had advised plaintiffs that it was very close to getting a CT that was competitive

with CT 516. The agreement between plaintiffs and CCI states that the end-user traffic would be owned 20% by CCI and 80% by plaintiffs, and would temporarily be moved to PSE's CT516 66% discount plan while finalizing its own contract tariff with AT&T. Arleo Cert. at Ex. A. When AT&T provided CCI and plaintiffs their own CT, the accounts would be moved back from PSE's CT516 discount plan to the CSTPII/RVPP plan that would have been converted to a new contract tariff. The CCI/PSE agreement states that the end-user traffic was required to be moved back from PSE's CT516 plan within 30 days notice to PSE. Id. at Ex. B.

Plaintiffs/CCI requested the transfer of accounts to PSE in accordance with Section 2.1.8 of AT&T Tariff FCC No. 2. It states:

> Transfer or Assignment – WATS, including **ANY** associated telephone **number**(s), may be transferred or assigned to a new Customer, provided that:
>
> A. The Customer of record (former Customer) requests in writing that the company transfer or assign WATS to the new Customer.
>
> B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include **(1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).**
>
> C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.
>
> The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. **These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s).** When a transfer or assignment

> occurs, a Record Change Only Charge applies (see Record Change Only, Section 3).

However, AT&T refused to make the transfer.

3. Plaintiff's Lawsuit

In 1995, plaintiffs filed suit against AT&T alleging several violations of the Communications Act, 47 U.S.C. 201, et seq., stemming from AT&T's refusal to transfer: (1) plaintiffs' plans to CCI; and (2) most of the end-user traffic from CCI/plaintiffs to PSE. In May of 1995, this Court ordered the 9 CSTPII/RVPP plans (with all the account traffic on them) transferred from plaintiffs to CCI as per section 2.1.8. Id. at Ex. C. AT&T did not appeal that decision and it is not at issue here. However, Judge Politan questioned the second transfer under the same tariff that would transfer most of the account traffic locations but not the plans, from the 9 CSTP/RVPP 28% plans to the 66% discount plan owned by PSE's CT 516. AT&T represented to Judge Politan that it had filed a proposed tariff change with the FCC (transmittal number 8179) that would answer Judge Politan's concern as to whether account traffic could be transferred without the plan. Under the doctrine of primary jurisdiction, Judge Politan took the matter under advisement, awaiting the FCC decision on transmittal 8179. Id. AT&T delayed seeking a ruling for many months and then withdrew the pending tariff transmittal 8179 after the FCC advised AT&T that it would have prospective effect only. Instead, AT&T replaced the pending tariff with a greatly expanded transmittal number 9229 that AT&T again claimed would answer whether section 2.1.8 allowed traffic transfers without the plan also being transferred. Plaintiffs then moved for reconsideration, arguing that the expanded transmittal still did not answer the question. On

reconsideration, Judge Politan found that AT&T's conduct had prejudiced plaintiffs' claim and, as a result, opted to decide the interpretation issue. Judge Politan ruled that the transfer of traffic without the plan was proper and granted a mandatory injunction against AT&T. Id. at Ex. D.

4. The Third Circuit's Ruling

AT&T appealed the District Court's ruling. On May 31, 1996, the Third Circuit entered an Order revoking the preliminary injunction and holding that the FCC had primary jurisdiction on the interpretation of the tariff. It directed the parties to proceed before the FCC on the sole issue of whether under Section 2.1.8 traffic can be transferred without transferring the entire plan. Id. at Ex. E. In response to the Third Circuit's directive, Judge Hedges entered an Order staying the case "until all proceedings before the FCC were concluded."

For the next several years, the matter languished at the FCC. As a result of AT&T's refusal to transfer the traffic or provide a contract tariff, plaintiffs' business was destroyed because customers moved their business to other aggregators who enjoyed greater discounts. Plaintiffs, which were billing as much as $75 million in 1993 lost tens of millions of dollars as a result of AT&T's wrongful refusal to provide a contract tariff or transfer the traffic.

In June of 1996, 18 months after AT&T's denial of the traffic transfer, AT&T initially placed millions of dollars of shortfall and termination penalties directly on plaintiffs' end-users even though the tariff required the penalties to initially be placed on plaintiffs' master

compensation account. The infliction of these penalties by AT&T directly against the end-users owned by the plaintiff companies was an illegal remedy and this Court had previously found that the plans were immune from such penalties in any event. This led to the filing in March of 1997 of a Supplemental Complaint in the District Court. In response, AT&T filed a counterclaim against plaintiffs. Those claims also are currently stayed but are not directly at issue in this motion.

5. The AT&T/CCI Settlement

AT&T then entered into a confidential settlement agreement with CCI. Fearing that the settlement could negatively impact plaintiffs' case, plaintiffs sought and successfully compelled AT&T to divulge the settlement agreement with CCI. Pursuant to the agreement, AT&T paid CCI substantial cash, waived its alleged shortfall and termination penalties against CCI, and waived a slamming suit against CCI but not plaintiffs. The settlement agreement required CCI to drop its complaints against AT&T and aid AT&T in its continued defense of the claims asserted by plaintiffs. Thereafter, plaintiffs moved to realign the parties and eliminate CCI as a co-plaintiff. Judge Hedges denied the motion on the grounds that the action was stayed pending completion of the FCC proceedings. Id. at Ex. F.

While waiting for the FCC to rule, this Court held a hearing to determine what, if any, damages were suffered by plaintiffs as a result of the AT&T/CCI settlement. On May 24, 2001, Judge Hayden ruled that plaintiffs' claims against AT&T were not compromised by the AT&T/CCI settlement.

6. The FCC Ruling

The FCC, on October 17, 2003, finally ruled. It held that Section 2.1.8 of AT&T's Tariff FCC No. 2 did not apply to traffic transfers without the plan, but the transfer of traffic could be effectuated under another section. Because AT&T had refused to effectuate the transfer, the FCC found that AT&T was in violation of § 203(c) of the Communications Act. Id. at Ex. G.

7. The D.C. Circuit's Ruling

AT&T appealed the FCC's ruling to the D.C. Circuit Court of Appeals. On January 14, 2005, the D.C. Court of Appeals reversed, ruling that Section 2.1.8 was

applicable and permitted an aggregator to transfer traffic without the plan. The Court stated:

> We find the Commission's interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, not just transfers of entire plans. In the absence of any contrary evidence, we find that "traffic" is a type of service covered by the tariff.
>
> * * *
>
> In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of traffic.

Id. at Ex. H, pp. 10-11.

The D.C. Circuit reversed the FCC concerning Section 2.1.8's applicability, thereby leaving plaintiffs in an even more deserving position since they had properly relied on Section 2.1.8 to transfer the traffic. After almost ten years, the issue referred by the Third Circuit in 1996 was finally decided. Section 2.1.8 permitted plaintiffs to transfer the traffic without a transfer of the entire plan. This motion follows.

LEGAL ARGUMENT

THE STAY SHOULD BE LIFTED BECAUSE THE SOLE ISSUE REFERRED TO THE FCC HAS BEEN DECIDED

AT&T does not refute the D.C. Circuit's ruling that 2.1.8 allows traffic transfers without the plan as the D.C. Circuit found. Instead, AT&T argues that the D.C Circuit's decision has left unresolved an issue that must be first resolved by the FCC under the primary jurisdiction doctrine. AT&T's argument is based on the language of the D.C Circuit's opinion which states:

> "We also do not decide precisely which obligations should have been transferred in this case, as this question was neither addressed by the Commission nor adequately presented to us."

Id. at Ex. H., p. 11.

At first blush, it appears that the D.C. Circuit's opinion left open an issue of interpretation for the FCC. However, a closer examination of all of the facts and prior rulings mandates a finding that all issues have been resolved and the stay should be lifted.

Preliminarily, it should be noted that the Third Circuit's opinion makes clear that the **only** issue referred to the FCC was "whether Section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction." Id. at Ex. E, p. 3. The D.C. Circuit has conclusively decided that issue in plaintiffs' favor. AT&T did not appeal the D.C. Circuit's decision or seek a rehearing en banc. Further, AT&T has not filed any petitions with the FCC seeking further rulings. Thus, all FCC proceedings have been concluded as per Judge Hedges' stay Order. Id. at Ex. F.

Nevertheless, AT&T has asserted that there exists a remaining issue of interpretation concerning which obligations are transferred when only the traffic is transferred without the plan under Section 2.1.8. AT&T is incorrect. A close reading of the subject tariff (as it existed at the time of the requested transfer) as well as the FCC's 2003 opinion compels the conclusion that the entire "obligations" issue is nothing more than a red herring aimed at further delaying this case.

The starting point of the analysis is Section 2.1.8, which at the time of the attempted transfer in January 1995, read as follows:

> Transfer or Assignment – WATS, including **ANY** associated telephone **number**(s), may be transferred or assigned to a new Customer, provided that:
>
> A. The Customer of record (former Customer) requests in writing that the company transfer or assign WATS to the new Customer.
>
> B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include **(1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).**
>
> C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.
>
> The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. **These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s).** When a transfer or assignment occurs, a Record Change Only Charge applies (see Record Change Only, Section 3).

First, a plain reading of the tariff makes clear that a new customer accepting traffic must assume two obligations (1) outstanding debt for the service and (2) the unexpired portion of any applicable minimum payment period(s). The first obligation arises if the end-user location does not pay its phone bill to AT&T on time. In that instance, AT&T would debit the RVPP credits to PSE's plan for these charges. The second obligation refers to a time obligation defined elsewhere in the tariff as one day. Section 2.1.8 also is clear that the transferors remain jointly and severally liable for those two obligations. Plaintiffs have never disputed this interpretation.

Indeed, the Transfer of Service Agreement forms provided for use by AT&T to the aggregators track the language of AT&T Section 2.1.8 verbatim and clearly show that the only two obligations mandated by Section 2.1.8 were indeed assumed by PSE.[4] Id. at Ex. I.

Stated simply, plaintiffs did exactly what AT&T required to satisfy the tariff but AT&T still refused to transfer the account traffic. AT&T wanted PSE to assume not only the only two obligations mandated by Section 2.1.8 and AT&T's own TSA form, but sought to impose two additional obligations concerning shortfall and termination. AT&T is wrong. First, if the tariff seeks to impose additional conditions, it must say so explicitly. 47 C.F.R. § 61.54 (1994); see also 47 C.F.R. § 61.2 (stating that all tariff publications must contain clear and explicit explanatory statements regarding rates and regulations). Any ambiguities are construed

[4] In fact, at oral argument before the D.C. Circuit, AT&T's counsel represented that the language of the TSA form tracks Section 2.1.8 and that a transferor could only satisfy the tariff by using AT&T's own form or an identical writing. Id. at Ex. J.

against the carrier. See Commodity News Services, Inc., v. Western Union, 29 FCC 1208, 1213, aff'd, 29 FCC 1205 (1960).

More importantly, the FCC squarely addressed the question of whether termination obligations were to be assumed by PSE. When faced with AT&T's argument, the FCC stated:

> Although AT&T also argues that the move also avoided the payment of tariffed termination charges, id., it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) is not at issue here. Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. **Accordingly, termination charges are not at issue in this matter."**

Id. at Ex. G, p. 8, fn. 56.

In addition, the FCC ruling has already clearly stated that shortfall obligations do not transfer on traffic transfers without the plan:

> If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSTP II/RVPP commitments would be associated with PSE's CT 516. Further, CCI (as well as the Inga companies) but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans. Once all of its traffic was moved to PSE, CCI might have needed to amass new traffic in order to meet its commitments under its CSTP II plans. AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.[5]

---

[5] **Judge Politan similarly found that plaintiffs' plans were immune from shortfall and termination obligations. Judge Politan keenly observed: "Commitments and shortfalls are little more than illusory concepts in the reseller industry – concepts which constantly undergo renegotiation and restructuring. The only 'tangible' concern at this juncture is the service AT&T provides. This Court is satisfied that such services and their costs are protected."** Id. at Ex. D, p. 19. Thus, Judge Politan correctly recognized that these obligations are nothing more than "monopoly money."

Id. at Ex. G, pp. 8-9.

Thus, the question of which obligations are assumed on traffic transfers without the plan has already been answered by the FCC and there is no reason to return to the FCC for a ruling on this non-issue.

Further, AT&T's stilted tariff interpretation that all shortfall and termination obligations are to be assumed on traffic transfers without the plan is totally contrary to the thousands of these types of transfers done by AT&T customers in the marketplace. Under AT&T's tariff interpretation, any aggregator or regular AT&T customer could simply transfer just a few accounts from their CSTPII/RVPP plan that had many thousands of accounts on it, and under AT&T's theory transfer away with just a few accounts, millions of dollars of shortfall and termination obligations. The remaining CSTPII/RVPP plan with the thousands of accounts on it would have no obligations left under AT&T's nonsensical interpretation.

AT&T's implausible interpretation is even more ludicrous in this instance. As previously noted, CCI intended to transfer its accounts to PSE and then transfer them back once it acquired its own tariff. Under AT&T's interpretation, all shortfall and termination obligations would follow. Thus, CCI would assume both its own obligations as well as PSE's original obligations under CT516, leaving PSE with no obligations whatsoever!

There is another commonsense way to view the distinction between the various obligations. Bad debt i.e. indebtedness is an account obligation that moves

with the traffic. Therefore, it attaches to the account traffic that produced the bad debt. Under the tariff the bad debt would be deducted from the RVPP credits on PSE's CT516 plan because that is where the accounts are located.

In contrast, shortfall and termination are CSTPII/RVPP plan obligations which attach to the CSTPIIRVPP plan's volume commitments which remain as obligations of plaintiffs under the transfer. Simply speaking shortfall or termination penalties are calculated on the plans volume commitment. Since the plans were not being transferred, the alleged shortfall and termination obligations do not transfer to PSE. Moreover, unlike account obligations, shortfall and termination penalties are imposed for unrendered services and, thus, constitute a 100% windfall to AT&T.

Additional evidence exists to show that the shortfall and termination obligations remained with plaintiffs' and CCI's plans. In November, 1995, 11 months after the requested transfer, AT&T amended Section 2.1.8 to **add express language concerning the assumption of shortfall and termination obligations**. The amendment applied prospectively only. Thus, shortfall and termination obligations were **not** obligations that had to be assumed by PSE, because the transfer was requested 11 months prior to the prospective change made by AT&T under Section 2.1.8. Indeed, the revised tariff expressly states:

> The requirement that the transfer or assignment be made using the standard AT&T Transfer of Service form shall apply to transfer or assignment requests made on or after November 9th, 1995.

Id. at Ex. K.

Thus, AT&T's own language makes clear that PSE was not required to assume shortfall and termination obligations. AT&T's claim that it was being defrauded of shortfall and termination is a bogus claim because it was not entitled to these obligations in the first place. Judge Politan was correct when he observed that the CSTPII/RVPP plans were immune from shortfall and termination because they were ordered prior to June 17, 1994 and, thus, grandfathered for life in the marketplace. The FCC has concurred:

> **Prior to June 17, 1994**, the Inga Companies completed and signed AT&T's "Network Services Commitment Forms for WATS under AT&T's Customer Specific Term Plan II (CSTPII) tariffed plan, which offered volume discounts off AT&T's regular tariffed rates.

Id., at Ex. G, p. 2 (emphasis added). There is no reason for the FCC to have noted that CSPTII/RVPP plans were ordered prior to June 17, 1994 other than to confirm that they were immune from shortfall and termination obligations.

Moreover, even if the CSTPII/RVPP plans were not immune from shortfall and termination charges, AT&T has already been compensated for these charges when it exchanged the alleged shortfall and termination charges for CCI's aid in helping AT&T defend itself against plaintiffs' lawsuit. Assessing these charges now against plaintiffs constitutes double billing and would constitute violations of Sections 201 (unreasonable practice), 202 (undue discrimination), and 203 (not consistent with tariff) of the Communications Act.

Put simply, AT&T's attempt to read additional obligations into Section 2.1.8 must be rejected. Judge Politan, in originally granting the preliminary injunction said it best:

> Plaintiffs cannot be held to construe the section governing transfers under the tariff as meaning that which it does not. Words mean what they say. Rules should not be changed in the middle of the game; and certainly without notice.

Id. at Ex. C, p. 21.

Lastly, the transfer of traffic without the plan is also addressed by Section 3.3.1Q of AT&T's tariff, which assesses a $50.00 per location charge to move traffic from one plan to another. Section 2.1.8 references these record change charges in Section 3.[6] Incredibly, AT&T has successfully turned a routine traffic transfer case into a drawn-out 10 year legal battle.

Finally, AT&T has argued that the D.C. Circuit failed to address AT&T's claim that the anti-fraud provisions of the tariff independently justified denial of the proposed transfer on grounds that the FCC's Order had not been addressed. Hence, AT&T asserts that it is an open issue requiring additional interpretation. Once again, AT&T is wrong. The FCC already decided this issue and rejected AT&T's argument. In section 2 of its ruling, the FCC clearly ruled that to the extent the proposed "location-only transfer" violated the fraudulent use provisions of Section 2.2.4 of its tariff, its remedy was not to refuse to accept the transfer from CCI to PSE. Its sole remedy was to "temporarily suspend service," which it did not do. Id. at Ex. G, pp. 9-10. Therefore, this defense already was rejected by the FCC and a "do-over" is not necessary.

[6] AT&T also tariffed a promotion that waived the $50.00 fee per account for the first 500 accounts moved per plan. Because the aggregators had nine plans, they were entitled to 4,500 free account transfers before having to pay for transfers.

CONCLUSION

Put simply, the sole issue concerning the applicability of Section 2.1.8 has already been decided by the D.C. Court of Appeals. Further, any remaining issues already have been addressed by the FCC and no proceedings are presently pending there. Accordingly, all proceedings before the FCC have been "concluded" and the stay should be lifted. After 10 long years, plaintiffs are entitled to proceed with their claims in this forum.

Respectfully submitted,

ARLEO & DONOHUE, L.L.C.
Attorneys for Plaintiffs, Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc.

By: _____
Frank P. Arleo (FPA-0801)

Dated: May 31, 2005

Exhibit C

ARLEO & DONOHUE, L.L.C.
ATTORNEYS AT LAW

Frank P. Arleo
Timothy M. Donohue
Dawn M. Donohue

622 Eagle Rock Avenue
Penn Federal Building
West Orange, NJ 07052
Telephone: (973) 736-8660
Fax: (973) 736-1712

Honorable William G. Bassler, U.S.D.J.
United States District Court
M.L. King, Jr. Fed. Bldg. & Courthouse
Room 5060
50 Walnut Street
Newark, New Jersey 07102

Re: Combined Companies, Inc., et al. v. AT&T
Civil Action No. 95-908

Dear Judge Bassler:

INTRODUCTION

As Your Honor is aware, this law firm represents plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. in this matter. Plaintiffs' motion to lift the stay imposed by this Court 10 years ago will be heard on a date and time to be set by the Court. In their moving papers, plaintiffs established that the stay must be lifted because (1) the D.C. Circuit has conclusively answered the sole question referred by the Third Circuit several years ago; and (2) all other questions of interpretation concerning the subject tariff have been resolved by the FCC and it is senseless to request it to make the same determinations again.

In opposing plaintiffs' motion, AT&T, has filed a submission that is both factually and legally incorrect. AT&T has submitted 100 pages of exhibits in an attempt to muddy the waters and further delay this matter. However, the time for delay is over. The rulings of the Third Circuit, FCC and D.C. Circuit make clear that plaintiffs' attempted transfer of traffic only under AT&T's tariff was proper and AT&T's failure to make the transfer is a violation of § 203(c) of the Communications Act. No further rulings are needed by the FCC.

AT&T'S PRELIMINARY STATEMENT AND BACKGROUND FACTS

1. AT&T's Preliminary Statement

In attempting to slant the argument in its favor, AT&T makes numerous factual assertions that are unsupported by any evidence, belied by AT&T's prior conduct and are simply incorrect. Happily, each misstatement is easily refuted. AT&T's assertions will be addressed seriatim.

Beginning with AT&T's Preliminary Statement, AT&T makes the bold statement that the D.C. Circuit Court has rejected the primary claim of the Inga Companies and has strongly suggested that the remaining theories are "meritless." Def. Brf. ("DB") at p. 1. Nothing could be further from the truth. Plaintiffs' primary claim always has been that its attempted traffic transfer was properly done in accordance with § 2.1.8. Plaintiffs have demonstrated that they even used AT&T's required TSA forms in making the transfer request.[7] By ruling that the traffic transfers were permissible under § 2.1.8, the D.C. Circuit has wholly endorsed plaintiffs' position.

[7] Before the D.C. Circuit, AT&T conceded as much. AT&T's brief stated CCI's use of "Transfer of Services Agreement" forms to request the pertinent movement of traffic conclusively established that Section 2.1.8 applied to their request. Arleo Supp. Cert at Ex. A. At oral argument, AT&T's counsel stated: "No, but the transfer form happens here to **say exactly what the tariff says**, and the only way you can **satisfy the tariff** is either use our form or submit in writing something that says exactly what our form says. Id. at Ex. B.

Also, contrary to AT&T's assertion, there is no suggestion anywhere in the D.C. Circuit's opinion that plaintiffs' remaining theories are "meritless." Id. at 1. In fact, the D.C. Circuit indicated that it was only ruling on the narrow question as to whether § 2.1.8 permitted the transfer.

Next, AT&T argues that the D.C. Circuit remanded remaining issues to the FCC. DB at p. 1. That is entirely false. The FCC has advised that there is no remand and no issues presently pending before the FCC. Id. at Ex. C.

Next, AT&T asserts that "the FCC acknowledged that § 2.1.8 of the tariff prohibits transfers of service unless the customer assumes 'all obligations'". DB at 2. The FCC's ruling explicitly stated that "all obligations" did not include S&T; but only what was encompassed within § 2.1.8 in January of 1995. The D.C. Circuit ruled that the FCC's conclusion that § 2.1.8 did not apply to traffic only transfers was incorrect. However, the ruling does not change the FCC's interpretation of that section when it applies. The FCC interpreted § 2.1.8 to mean that the only two obligations contained in the tariff (before AT&T attempted to amend it 11 months later) must be assumed by the transferee. AT&T now asserts that two additional obligations, shortfall and termination ("S&T"), also had to be assumed by the transferee even though the tariff does not so state. As we conclusively demonstrated in our moving brief, S&T obligations were not a part of the filed tariff at the time of the requested transfer, they were added prospectively 11 months after the transaction at issue.[8] See Orloff v. FCC,

[8] Further support is found in the tariff amended on November 9, 1995. It states "the shortfall charge will not apply in connection with the discontinuance of a CSTPII that was ordered prior to June 17th, 1994. Thus, it is clear that plaintiffs' plans were grandfathered and were immune from penalties. AT&T senior counsel Charles Fash admitted as much in a July 3, 1996 letter wherein he stated that shortfall charges could not have been in issue at the time of the traffic transfer. Id. at Ex. D.

352 F.3d 415, 421 (stating that "filed tariffs are pointless if the carrier can depart from them at will.")

Moreover, even assuming that the tariff somehow is ambiguous on this issue (although a plain reading strongly suggests it is not), it must be construed against the drafter, AT&T. See Commodity News Services, Inc. v. Western Union, 29 FCC 1208, aff'd, 29 FCC 1205 (1960).

AT&T again plays fast and loose with the facts when it states that the FCC "assumed that the purpose of the transfer was to defraud AT&T out of shortfall/termination charges." DB at p. 2. The FCC made no such assumption. In reality, it stated in its opinion: "even assuming that AT&T reasonably suspected 'fraudulent use' under Section 2.2.4 the remedy under its tariff . . . was suspension of service, not refusal to move the traffic. Arleo Cert. at Ex. G, p. 12. In short, the FCC has ruled that AT&T's only remedy was to temporarily suspend service – which it did not do. A blanket refusal to make the transfer was an illegal remedy and a clear violation of the Communications Act. Moreover, as the FCC found, AT&T, by using an illegal remedy, is precluded from relying upon the argument that it is entitled to S&T obligations.[9]

AT&T then goes on to suggest that there are "open issues" which were originally raised by plaintiffs and not adequately addressed by the FCC. DB at p. 2. The argument is a red herring. The Third Circuit referred only one question: Whether § 2.1.8 permitted transfers of traffic without a transfer of the entire plan. AT&T has submitted voluminous exhibits in an attempt to create the misimpression that there are

[9] AT&T also asserts that the FCC failed to consider §2.8.2, which may be used to deny additional service in the case of suspected fraud. First, AT&T never raised this argument to the FCC and, therefore, was barred from raising it on appeal. Second, as the FCC argued to the D.C. Circuit, it is common sense that moving traffic away from CCI cannot be considered a denial of "additional service" to CCI. Similarly, PSE cannot be subject to the sanction of denial of service under its tariff for any alleged non-payment of charges by CCI .

open issues when there are not. Further, any ancillary issues are moot since it is undeniable that AT&T used an illegal remedy and, thus, cannot rely on its alleged S&T charges even if the plans somehow were not immune from the charges.

Finally, the fact that plaintiff may have submitted additional issues to the FCC for interpretation does not mean that they are duty bound to do so once again now that the D.C. Circuit has ruled. Stated differently, the only question referred by the Third Circuit has been answered. The fact that the D.C. Circuit ruled that the FCC incorrectly concluded that § 2.1.8 did not allow traffic only charges does not change the fact that the FCC has fully interpreted that tariff. In other words, as a result of the D.C. Circuit's opinion, the FCC's prior interpretation now applies not only to plan transfers but also traffic transfers. There is no reason to seek additional interpretation.

2. AT&T's Background Facts

AT&T's recitation of the background facts are similarly distorted. First, AT&T asserts that the "volume and term commitments were the essential quid pro quo for the discounted rates." DB at p. 3. That is simply not so. Plaintiff's companies were by far the largest aggregators with $54 million in billing. Yet, they received only a 28% discount. In stark contrast, PSE's CT516 plan was given a whopping 66% discount on only $4 million per year in billing.[10] Therefore, AT&T's rhetoric that the S&T obligations were the essential quid pro quo for the discounted rates is pure fantasy.[11]

Next, in an effort to further support its unjustified refusal to make the transfer, AT&T asserts that Mr. Inga admitted to an AT&T manager that the purpose of the traffic transfer was the evasion of S&T liability. DB at p. 4. This statement is not only

[10] In fact, plaintiffs' own office was offered 51.3% discount on its $200.00 per month phone bill, as were other mom and pop businesses. Supp. Cert at Ex. E.

[11] Also, AT&T denies it had engaged in a campaign to put aggregators out of business. The facts show otherwise. Id. at Ex. F.

false, it defies logic. First, it is absurd to believe that Mr. Inga would notify AT&T that he was attempting to evade the S&T policies, especially when AT&T controlled all of the money.[12] Second, to the extent that an AT&T witness has made this false allegation, that is precisely the type of fact issue that must be resolved in a trial in this Court. It is not an issue of interpretation for the FCC.

Also, on page 4 of its brief, AT&T claims that it declined to process the two-step transfer because it believed "there is a substantial risk that the 'traffic only" traffic would have resulted in CCI (which is a new company) not being able to satisfy obligations under the tariff." DB at 4. AT&T ignores the simple fact that under § 2.1.8, both companies would remain jointly and severally liable for AT&T's alleged shortfall. Correctly recognizing this, the FCC stated:

> If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSPTII/RVPP commitments would be associated with PSE's CT516. Further, CCI (as well as the Inga Companies), but not PSE, would continue as being responsible for any shortfall obligations under the CSTPII/RVPP plans. Once all of its traffic is moved to PSE, CCI might have needed to amass new traffic in order to meet its commitments under its CSTPII plan. AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.

Id. (emphasis supplied). The D.C. Circuit Court's ruling that § 2.1.8 was applicable to this transaction does not change the FCC's common sense interpretation and there is no reason to return to the FCC for reaffirmation.

Incredibly, AT&T's then asserts that plaintiffs' primary claim to the FCC was "that 2.1.8 was inapplicable." DB at p. 7. AT&T's statement evidences a complete

[12] This claim is particularly suspect in light of the fact that Mr. Inga has provided taped conversations with 13 AT&T senior managers – including the affiant – wherein all stated that plaintiffs' plans were forever immune from S&T obligations. The tapes have been provided to AT&T and this Court.

misunderstanding (or an intentional misstatement) of plaintiffs' position. In any event, plaintiffs have already addressed this issue infra.

Unable to explain why it added S&T obligations prospectively 11 months after the transaction, AT&T needed to come up with a new defense. In doing so, however, AT&T misquotes the second obligation in order to set up its argument. The tariff actually states "These obligations include (1) all outstanding indebtedness for WATS and (2) the unexpired portion of any applicable minimum payment(s) periods. AT&T misstates obligation No. 2 as "the unexpired portions of any minimum service. DB at p. 7. Obviously, payment is not service. AT&T makes this misstatement so that it can argue that S&T obligations are actually minimum payment (service to AT&T) periods. However, the tariff does not say that and to the extent it is ambiguous it must be construed against AT&T. DB at p. 7.

In reality, the record and the nine signed TSA's make clear that plaintiffs intended that PSE assume all the obligations required by § 2.1.8 as it then existed. AT&T never reached this issue because it balked at making the transfer based on its unsupported speculation that plaintiffs were trying to avoid their obligations.

Having laid a false foundation, AT&T then asserts that obligation (b) of § 2.1.8 includes S&T obligations. However, if this is true, why did AT&T then add these obligations to § 2.1.8 on a prospective basis 11 months after the traffic transfer at issue? AT&T's prospective filing leads to the inescapable conclusion that these obligations were not part of § 2.1.8 at the time the traffic transfer was requested. AT&T misquotes its tariff, and then misinterprets its meaning, in an attempt to assert a newly minted

defense after 10 years because it cannot explain its November 11, 1995 prospective tariff filing.[13]

AT&T also asserts that no benefits are left to plans after the traffic is temporarily transferred. Once again, AT&T is incorrect. First, traffic always fluctuates; it is the plan that is the perpetual asset. Second, the obligations occur at fiscal year end, not monthly. Third, the benefits to plaintiffs are many, and included (1) CSTPII's are renewable at the aggregator's discretion; **(2) grandfathered rights (for pre-June 17, 1994 plans)**; and (3) no security deposits because a plan's previously established credit history allows a merger into a new contract without posting a $13.5 million deposit.

In short, AT&T keeps shifting its defense in an attempt to find one that might work. Initially, AT&T allowed "traffic only" transfers without the transfer of S&T obligations. Id. at Ex. G. Then, in 1995, AT&T stopped traffic only transfers completely, arguing that § 2.1.8 did not allow such transfers and only allowed whole plan transfers.[14] When that argument appeared destined to fail in D.C. Circuit, AT&T argued that the transfer obligations vary depending on what is being transferred. Then, after AT&T realized that the D.C. Circuit intended to rule that traffic only transfers were permitted under § 2.1.8, AT&T concocted the defense that plaintiffs never intended to assume any obligations and, therefore, violated § 2.1.8. Finally, once AT&T realized that its argument that plaintiffs' TSA forms indeed assumed the only

[13] The time for AT&T to assert this new defense has long expired. Section 2.1.8 gives 15 days to question the transaction, not 10 years.

[14] **This position was obviously incorrect because documentation demonstrates that AT&T previously permitted traffic only transfer and then completely stopped that practice.** Id. at Ex. H. There was never a requirement that S&T be assumed. That change in position created the narrow issue as to whether § 2.1.8 allowed traffic only transfers.

two obligations required by the tariff, it created its final defense (hopefully) that the subsection (b) obligation contained in § 2.1.8 (unexpired minimum payment periods) includes S&T.

In reality, AT&T's new defense puts it in an untenable catch-22 position where it loses either way. Prior to this transfer, plaintiff did several other "traffic only" transfers to various aggregators. Under AT&T's theory, all S&T obligations must have previously transferred away, thereby leaving plaintiffs with zero S&T obligations. Using that theory would result in zero S&T obligations left to transfer to PSE in January 1995. Yet, AT&T now argues that CCI's plans still had S&T obligations, thereby confirming its "real" position: S&T obligations do not transfer on "traffic-only" transfers. AT&T has not produced even one routine "traffic only" transfer transaction to support its theory.

AT&T then presents a laundry list of all topics that were covered by plaintiffs before the FCC and the D.C. District Court, including: (1) pre-June 17, 1994 immunity; (2) the $50.00 per location transfer fee; (3) other comparable traffic transfers; and (4) AT&T transmittal 8179. AT&T argues that the FCC must also provide interpretation of these issues. AT&T is incorrect. Simply because plaintiffs raised additional arguments in support of its position before the FCC does not mean that it must go back and raise them again.[15] To the contrary, in light of the D.C. Circuit's ruling, there is no need to do so. It is clear that AT&T has violated the Act

[15] Further, the FCC has already ruled on some of these issues. As we noted in our moving brief, the fact that the FCC specifically noted in its ruling that the transfer was requested before June 17, 1994 underscores the fact that the FCC understood that S&T obligations contained in the amended tariff did not apply to this transfer.

and the stay should be lifted in this Court so plaintiffs can press forward on the issue of damages.

On page 9 of its brief, AT&T again reasserts its ill-conceived notion that plaintiffs' alleged (but unsupported) fraudulent evasion of shortfall charges somehow survives the FCC's prior ruling. The FCC previously ruled that AT&T's sole remedy in this instance would be the temporary suspension of service and not a permanent refusal to transfer traffic. This ruling does not change simply because the D.C. Circuit has now ruled that § 2.1.8 is applicable to this transfer. In fact, it reinforces it. There is no reason to petition the FCC to rule on that which it has already ruled.

LEGAL ARGUMENT

THIS COURT MUST VACATE THE STAY

AT&T's argument that this Court should not vacate the stay in this matter stands the case on its head. AT&T states "it has never been disputed in this case that transfers of traffic are permissible under § 2.1.8 when the associated liabilities are assumed." DB at p. 11. However, AT&T incorrectly asserts that the "associated liabilities" must include S&T. In reality, plaintiffs' nine TSA forms show clearly that it intended to transfer the only two obligations under § 2.1.8, which does not include S&T.

Amazingly, AT&T tries to suggest that the D.C. Circuit ruling was somehow a "win" for it. That is simply not the case. AT&T states that "the D.C. Circuit has strongly indicated that § 2.1.8 authorized AT&T's actions." DB at p. 12. AT&T must be reading a different opinion. The D.C. Circuit ruled that § 2.1.8 was applicable and permitted plaintiffs to transfer traffic only. It made no other findings and does not suggest in any way that § 2.1.8 allowed AT&T to refuse to move the traffic.

Next, in subsection A of its Legal Argument, AT&T makes the wishful argument that the D.C. Circuit has deemed plaintiffs claims as "likely meritless." Once again, AT&T places a spin on the D.C. Circuit's opinion that simply is not there. All the D.C. Circuit stated was that a transfer under § 2.1.8 requires a transfer of all the attendant obligations. The FCC said the same thing. Indeed, the FCC went further and defined precisely which two obligations are transferred. AT&T now attempts to read into the tariff additional obligations that were not there at the time of the transfer.

Further, AT&T's assertion that the D.C. Circuit suggested plaintiffs' attempted an "end run around" the tariff misreads the opinion. A close reading shows that the D.C. Circuit was not referring to plaintiff's specific transaction but to the FCC's erroneous account transfer methodology. In this transaction, plaintiffs did not circumvent § 2.1.8 by transferring one billed number at a time; they did a bulk transfer wherein all obligations were assumed.

Finally, the two cases cited by AT&T in support of its position, Telecom Int'l America, Ltd. v. AT&T Corp., 67 F. Supp. 2d 189 (S.D.N.Y. 1999) and 800 Services, Inc. v. AT&T Corp., Civil Action No. 98-1539 (D.M.J. Aug. 28, 2000), aff'd, 2002 WL 215625 (3d Cir. Feb 12, 2002) actually make the case for plaintiffs. First, in 800 Services Inc., Judge Politan correctly recognized that only **newly ordered plans after June 1994 were subject to S&T obligations**. Thus, 800 Services, Inc.'s plans were subject to S&T obligations while plaintiffs' plans were not. Second, it is significant that in neither case were the parties referred to the FCC on primary jurisdiction grounds.

Put simply, try as it might, AT&T cannot change the fact that the D.C. Circuit has answered the Third Circuit's question in plaintiff's favor and the illegal remedy utilized by AT&T moots all other issues. Any other questions of interpretation needed

for this case to proceed already have been addressed by the FCC and are not altered by the D.C. Circuit's opinion. All other issues are issues of fact to be resolved in this Court. Thus, the stay must be lifted.

CONCLUSION

For all of the foregoing reasons, as well as for the reasons contained in our moving papers, we respectfully submit that this Court lift the stay previously imposed in this matter.

Respectfully submitted,

ARLEO & DONOHUE, L.L.C.

By: *s/Frank P. Arleo*
Frank P. Arleo

FPA:hm
cc: Richard Brown, Esq.

Exhibit D

ARLEO & DONOHUE, L.L.C.
ATTORNEYS AT LAW

Frank P. Arleo
Timothy M. Donohue

Of Counsel:
JoAnn K. Dobransky

622 Eagle Rock Avenue
Penn Federal Building
West Orange, NJ 07052
Telephone: (973) 736-8660
Fax: (973) 736-1712

January 12, 2007

Via Electronic Case Filing

Honorable William G. Bassler, U.S.D.J.
United States District Court
M.L. King, Jr. Federal Bldg. & Courthouse
Room 5060
50 Walnut Street
Newark, New Jersey 07102

Re: Combined Companies, Inc., et al. v. AT&T
Civil Action No. 95-908

Dear Judge Bassler:

INTRODUCTION

On behalf of the Inga plaintiffs, we respectfully submit this letter brief in further support of plaintiff's motion to lift the stay asserted in this matter over ten years ago. Plaintiff's motion is returnable on May 25, 2006 at 10:00 a.m.

In their prior submissions, the Inga plaintiffs conclusively demonstrated that their motion to lift the stay should be granted because the narrow question of tariff interpretation posed by the Third Circuit in 1996 has been answered. Specifically, the D.C. Circuit Court of Appeals has clearly confirmed and as of 2005 AT&T has now admitted that AT&T Tariff section 2.1.8 permits traffic-only transfers.

In response, AT&T asserts that an issue of interpretation remains regarding precisely which obligations should have been transferred with the traffic.

In their prior submissions, the Inga plaintiffs set forth several arguments why AT&T's newly minted defense must fail. The additional information contained within conclusively ends the discussion. Thus, we requested and received permission to make this additional submission.

ARGUMENT

Preliminarily, it should be noted that AT&T's defense has been chameleon-like, constantly changing and morphing as this matter weaved its way through the FCC and the judicial system and AT&T's arguments were repeatedly shot down. Ten years ago, AT&T argued simply that 2.1.8 did not permit traffic-only transfers, just entire plan transfers as the FCC also erroneously believed. AT&T maintained this argument in its public comments to the FCC, leading to the FCC's October 17, 2003 Declaratory Ruling.

AT&T clearly understood that plaintiffs did its partial traffic transfer under 2.1.8. Therefore, when the FCC stated that it believed that partial traffic transfers were not governed by 2.1.8 but ruled in favor of the Inga plaintiffs anyway, AT&T was in a predicament. Appealing the FCC's decision, AT&T had to argue against the FCC's non-2.1.8 traffic transfer methodology but AT&T knew it would be arguing for plaintiffs because AT&T knew plaintiffs did its partial traffic transfer under 2.1.8.

Which obligations were transferred on partial traffic transfers was never an issue prior to the DC Circuit, but now AT&T needed to make it an issue as a bogus safety valve. Therefore, AT&T introduced its first bogus "no obligations" were transferred defense to the DC Circuit as a back-up plan if the D.C. Circuit correctly

determined that 2.1.8 allowed traffic only transfers. AT&T's position regarding which obligations transferred changed again before this Court in 2005 as AT&T twisted and took out of context a statement in the Inga plaintiffs' 2005 D.C. Court post-oral argument brief and switched to a new "only one" obligation (indebtedness) was transferred defense. AT&T possibly believed the bogus "only one" obligation transferred defense, based upon a 2005 statement, would be more believable than the bogus "no obligations" transferred defense. In addition to changing its position regarding which obligations were transferred in 2005, AT&T also asserted to this Court for the first time that S&T obligations are actually part of 2.1.8's second obligation concerning the minimum payment period(s). However, as this Court will see, AT&T already lost this bogus argument in February 1995 when it made its substantial cause claim to the FCC and the FCC denied it.

The central issue at this juncture is AT&T's assertion that additional language added to Section 2.1.8 in November 1995, which required the transfer of shortfall and termination (S&T) obligations, was a mere "clarification" and not a prospective tariff change in hope that this Court would erroneously believe that AT&T could govern the January 1995 partial traffic transfer request. AT&T has made this assertion on at least two occasions. AT&T June 2005 brief at p. 8. First, AT&T states that the Inga plaintiffs.

> relied on the ground that AT&T had filed and withdrawn a tariff transmittal (No. 8179) that did no more than codify the existing requirements of AT&T's tariff" (emphasis in original).

Once again, in a March 27, 2006 reply letter, AT&T stated that

> A subsequent clarification that 'all obligations' [in 2.1.8] include shortfall and termination obligations does not alter the breadth of the earlier version, or demonstrate that the phrase 'all obligations' meant only some obligations" (emphasis added).

Based on its clarification defense, AT&T argues that when it submitted proposed tariff change Transmittal 9229, which became effective November 9, 1995

on a prospective basis, it was merely "clarifying" that the additional S&T obligations were part of 2.1.8, within the second obligation unexpired minimum payment period.

That argument can be soundly rejected. 47 C.F.R. § 61.54 mandates that tariffs contain certain codes and symbols. A copy of the code/symbol key is annexed at **Exhibit A**. As Exhibit K to plaintiff's May 31st 2005 submission clearly demonstrates, the proposed tariff contains the letter "C" as part of the tariff revision next to the addition of S&T obligations. As can be plainly seen, adding S&T obligations to Section 2.1.8 was undeniably a substantial change and, therefore, required a "C" designation. If the revision was a mere clarification as AT&T incorrectly asserts, the FCC would have permitted AT&T to use the letter "T" to signify a change in text but no change in the rate or regulation.

Moreover, 47 C.F.R. 61.54(j) clearly holds that S&T obligations are not permitted to be encompassed within unexpired minimum payment period(s):

> Any special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate.

Id. (emphasis added). Clearly, 2.1.8 contains no such specific reference to S&T obligations. Also, as the FCC correctly noted Rule 61.2 at pg. 10 footnote 65:

> Pursuant to Rule 61.2, titled "Clear and explicit explanatory statements, as in effect in January 1995, in order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. 61.2 (1994). It is well settled rule of tariff interpretation that "tariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, for the user can not be charged with knowledge of such intent or with the

> carriers canon of construction. Associated Press Request for a Declaratory Ruling, 72 FCC 2d at 764-765, para. 11 (quoting Commodity News Services, Inc. v. Western Union, 29 FCC at 1213, para. 2.)"

Ex. G. to plaintiffs' moving brief at p. 10, fn. 65.

Put simply, the FCC has already interpreted the tariff by mandating that if AT&T was to add the transfer of S&T obligations to 2.1.8, it would have to be submitted as a prospective change "C", not a clarification receiving the designation "T". Therefore, AT&T's argument that additional interpretation of the tariff is required must be rejected. The tariff change concerning S&T was clearly prospective only and did not apply to plaintiffs' January 1995 traffic transfer request.[16]

Moreover, information was obtained by plaintiffs pursuant to the Freedom of Information Act (FOIA). This information clearly demonstrates that in February of 1995 AT&T tried to convince the FCC, as it does this court today, that S&T obligations were already encompassed within the language of the second expressed obligation contained in 2.1.8, the unexpired minimum payment period. As the FCC notes, which were developed by the FCC in preparation for its argument with AT&T, annexed at **Exhibit B,** clearly demonstrate, the FCC rejected AT&T's existing language argument:

> D. Lastly ATT says that existing TEA rules seem to cover it in that they say new customer must agree to assume all obligations of the former customer. If ATT is so certain of this, why not forget the new language as by itself, there may be nothing untoward in what is

[16] In addition, the FCC's decision made it clear that no tariff change would affect plaintiffs' transaction: "We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern resolution of this matter." Ex. G to plaintiffs' moving brief at p. 11.

happening but the result would vary by situation and the new language is too arbitrary.

Secondly, the language now talks about assuming obligations and says these obs include (but does not say "but not limited to") out indebted of serv and unexpired portion of min pay period(s). It says nothing about tp or CT oble and Tariff 2 refs to min pay period talk about min payment period is 1 day for WATS (which includes cl 800) and for all other 800 services it would seem- 6.2.A. and 2.5.5. And charges applicable for min payment period includes recurring charge(s), nonrecurring charge(s) and/or special construction charge(s). Moreover, in proposed revisions, ATT seems to leave this out of the item 5 location whereas they have it in both 2 and 5 for Tariff 1 already giving some credence to the fact they see this as something new and additional.

Moreover, the unexpired portion of any applicable min pay period would not seemingly include unexpired portion of any term of service and usage or rev commit but has its own unique meaning and, therefore, the provision about the term plan and commitments being included as part of the min pay period in conflicting and we find in favor of customers in cases of conflicts. And in the case of Tariff 1 where the provs already exist, they would seemingly conflict too and would not be enforceable.

So the question of existing language in TorA already covering the situation here may well be questionable too given the above analysis although we agree our analysis is just one view and itself raises questions that might well leave the outcome to a particular complaint with a FCC judgment rather than having the arbitrary new language

E. The substantial cause showing[17] would seemingly have to be beefed up to pass muster as it never gets to any financial impact on AT&T but simply talks about ATT's

[17] Under the substantial cause test, the FCC measures the reasonableness of a tariff modification by weighing two principal considerations: the "carrier's explanation of the factors necessitating the desired changes at that particular time," and the "position of the relying customers." RCA American Communications, Inc., 86 FCC 2d 1197, 1201-02 (1981) (holding that a carrier's decision "to revise material provisions in the middle of a term" will be considered "reasonable" if the carrier can make a showing of "substantial cause" for so doing). The FCC also noted that it had previously applied the substantial cause test only to revisions of individually negotiated contract tariffs and to revisions of generic, long-term service tariffs filed by dominant carriers as was the case here. Id.

> interpretation of what the current situation and provisions should mean. Moreover, existing customers might well take exception with the statement in SC that the revs do not affect rates applicable to exist to our CT customers and any non rate affecting change is minor.
>
> Finally, SC says ATT should not have to grandfather exist custs or get different admin rules based on only when entered into tps and that develop and implementing such rules would create needless regulatory complexities with attendant costs and delay. But this does not make sense. Would ATT not have to develop the same procedures for all customers now without grandfathering and do they not already have the existing procedures for existing customers. So what is the big deal. The new procedures have to be developed anyway. And they will have to be implemented in any event. (emphasis added)

Id.

AT&T knew in February 1995 that the FCC was not buying its assertion that S&T was included in 2.1.8. Therefore, in response, AT&T then proposed the addition of new S&T language to 2.1.8. AT&T's second strategy was to convince the FCC to retroactively apply the new language addition but the FCC also rejected that argument. Id. Therefore, the prospective November 1995 revision went in as a change, denoted by a "C", and not a clarification denoted by a "T". [18]

Of course, under the Filed Tariff Doctrine, AT&T must strictly adhere to its tariff and the tariff states that it is a change "C" and not a clarification, "T". See generally Lowden v. Simonds-Shields-Lonsdale Grain Co., 306 U.S. 516, 520 (1939).

[18] Moreover, by FCC Order dated October 23, 1995, (5 months prior to this Courts March 1996 ruling) AT&T agreed to grandfather existing customers when it introduced a change to its tariff. AT&T however failed to convey its obligation to this Court. This included not only the November addition of S&T but the Pre 17th 1994 S&T immunity. Annexed at **Exhibit C**. The Order further required AT&T to give notice of the proposed change to customers, who were then given a chance to object. The proposed change would be subject to a "substantial cause" test before the FCC. This Order is additional evidence besides the tariff that any change would have prospective effect only.

Moreover, the assertion that Section 2.1.8 even needed to be "clarified" is self-defeating as it constitutes an admission by AT&T that its tariff was ambiguous, and therefore by law, must be construed against it.[19]

Further, even if AT&T's position is somehow credited, there is no explanation why the transfer was not processed. After all, the TSA form (which was drafted by AT&T and is verbatim 2.1.8) does not say: "Do not transfer the S&T obligations." Therefore if AT&T's bogus theory that S&T obligations were actually encompassed within minimum payment period(s), which AT&T now claims it actually believed, there was absolutely no justification for AT&T in January of 1995 not to process the transfer. Incredibly, AT&T is using a comment AT&T took out of context made by the Inga Companies in the year 2005 to justify not transferring the traffic 10 years earlier in the year 1995! If AT&T had question regarding which obligations were being transferred, it could have simply asked, but it did not do so because which obligations transfer on traffic-only transfers was not an issue, and therefore not AT&T's defense at the time of the request. Ten years ago, it simply took the bogus position that 2.1.8 did not permit traffic-only transfers.[20] AT&T has no evidence to suggest otherwise.[21]

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[19] **The transfer of S&T obligations is a moot issue anyway because AT&T has clearly admitted on a related case that pre-June 17, 1994 issued plans were immune from S&T.** Indeed, AT&T's March 27, 2006 reply letter failed to even address this admission entirely.

[20] In addition, 2.1.8 allows only 15 days to question a transfer. AT&T's latest bogus defense was not concocted for 10 years, after its other arguments were repeatedly rejected.

[21] AT&T has also taken the position, starting in the year 2005, that only one (indebtedness) of the only two obligations contained in 2.1.8 were transferred. However, that position is belied by the D.C. Circuit's opinion, which clearly confirms that both obligations were transferred. Ex. H to plaintiffs' moving brief at p. 11. The Shipp Certification, submitted previously, also confirms that both

Also, if AT&T's bogus "clarification" theory is correct, why is AT&T unable to produce any pre-November 1995 evidence showing examples of other partial traffic transfers in which S&T obligations also transferred. After all, over the years, tens of thousands of businesses divested divisions which used toll-free service. The only partial traffic transfer that AT&T exhibits in its June 2005 brief is the 1993 traffic transfer from an Inga Company to another aggregator, Ameritel. Significantly, no S&T obligations were transferred at that time.

Furthermore, if AT&T's new position that S&T obligations are encompassed within the minimum period obligation is to be believed, that necessarily means that plaintiffs already transferred away all its S&T obligations to Ameritel in 1993, two years prior to the January 1995 traffic transfer. In short, under AT&T's bogus theory, there no longer were any S&T obligations in 1995 to be transferred. Stated in the converse, the fact that AT&T states there were S&T obligations remaining on the plans in January 1995 is a clear admission that AT&T knows that S&T obligations simply did not transfer in 1993 nor any time prior to November of 1995.

In sum, the evidence is overwhelming that the transaction was attempted under 2.1.8 and all necessary obligations were transferred in 1995. AT&T's is attempting to revive already defeated arguments. It's time to stop the charade.[22]

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obligations were transferred. Several additional Inga plaintiffs' statements substantiating that all the necessary obligations were transferred can also be furnished.

[22] The FCC has already stated the DC Circuit decision is not a remand probably due to the fact that it already interpreted the obligations transferred issue in AT&T's February 1995 substantial cause claim. AT&T accepted the FCC's decision by making the tariff change prospective beginning in November of 1995. The FCC has now confirmed that the Court should not be concerned that a conflicting decision may be handed down by the FCC as there are no pending administrative proceedings concerning other CSTPII/RVPP Plans. Annexed at **Exhibit ___.**

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Inga plaintiffs' motion to lift the stay should be granted.

Respectfully,

ARLEO & DONOHUE, LLC

By: _____
Frank P. Arleo

FPA:hm
cc: Richard Brown, Esq. (via fax and regular mail)
Alfonse G. Inga (via e-mail)

Exhibit E

ARLEO & DONOHUE, L.L.C.
ATTORNEYS AT LAW

Frank P. Arleo
Timothy M. Donohue

Of Counsel:
JoAnn K. Dobransky

622 Eagle Rock Avenue
Penn Federal Building
West Orange, NJ 07052
Telephone: (973) 736-8660
Fax: (973) 736-1712

Via Electronic Case Filing

Honorable William G. Bassler, U.S.D.J.
United States District Court
M.L. King, Jr. Federal Bldg. & Courthouse
Room 5060
50 Walnut Street
Newark, New Jersey 07102

Re: Combined Companies, Inc., et al. v. AT&T
Civil Action No. 95-908

Dear Judge Bassler:

INTRODUCTION

On behalf of the Inga plaintiffs, we respectfully submit this letter brief in reply to the opposition papers filed by defendant AT&T and in further support of plaintiffs' motion for re-argument, pursuant to Local Rule 7.1(g).[23]

In denying the Inga plaintiffs' motion to lift the stay imposed over ten years ago, this Court ruled that the Inga plaintiffs should return to the FCC to obtain an interpretation of AT&T Tariff 2.1.8 in light of the D.C. Circuit's ruling that 2.1.8 applies to plaintiffs' attempted traffic transfer. In so ruling, this Court opined that the FCC's interpretation was not clear because it held that it was not applicable to partial traffic transfers.

In moving for re-argument, the Inga plaintiffs have conclusively demonstrated that there is no need to return to the FCC because the FCC interpreted the tariff in a subsequent filing with the D.C. Circuit Court. Also, AT&T, in numerous filings, has repeatedly confirmed plaintiffs' position that the shortfall and termination (S&T) obligations do not transfer on a partial traffic transfer.

LEGAL ARGUMENT

POINT ONE

THE FCC HAS INTERPRETED 2.1.8

A. The FCC Clearly Has Opined That S&T Obligations Do Not Transfer

In refusing to lift the stay, this Court's ruling was very narrow. It did not address the plethora of irrefutable evidence showing that AT&T never required a transfer of S&T obligations on partial traffic transfers. Instead, it held only that

[23] We apologize for the lengthy submission. However, as the Court can imagine, after eleven years, the Inga plaintiffs have obtained, and continue to obtain, voluminous, uncontroverted evidence that refutes AT&T's position that S&T obligations transfer on partial traffic transfers. AT&T's claim that plaintiffs have submitted old evidence that has been readily available, is incorrect. As this Court knows, much of the file has been archived and is unavailable. We can provide a certification to that effect if the Court wishes. In any event, AT&T's ad nauseum requests for sanctions should be summarily denied.

the FCC should provide a clearer interpretation of 2.1.8 in light of the D.C. Circuit's ruling that the tariff applies to traffic only transfers.

In their moving papers, the Inga plaintiffs demonstrated that there is no need to return to the FCC because the FCC already has set forth a clear interpretation of 2.1.8 in its brief to the D.C. Circuit.

In response, AT&T argues that this Court cannot accept arguments made in the FCC's appellate brief because the arguments are not controlling. However, AT&T's reliance on SEC v. Chenery, 332 U.S. 194 (1947) and AT&T Corp. v. FCC, 236 F.3d 729 (D.C. Cir. 2001) is misplaced. Those decisions stand for the proposition that an appellate counsel's post hoc rationalization for agency action cannot be relied on if it is not contained in the original order. In other words, a party cannot add additional rationales for a decision if that rationale was not advanced below. In its brief, the FCC clearly interpreted the obligations language of 2.1.8 as it pertained to a traffic only transfer. Thus, plaintiffs have cited clear evidence that the FCC has interpreted the tariff as not requiring a transfer of S&T obligations. Consequently, there is no need to return to the FCC and this Court should grant plaintiffs' motion for re-argument.

In addition, AT&T's June 26, 2006 reply brief now erroneously states that S&T obligations must also transfer on traffic only transfers. However, AT&T's position as of its March 27, 2006 letter to this Court agreed with Mr. Larry Shipp's Certification and stated that there was no dispute with Mr Shipp's position that only the two obligations listed within 2.1.8 transfer, but not the S&T obligations on traffic only transfers:

> They submit a Certification by CCI's President, Larry G. Shipp, that allegedly "clarifies the nature and type of obligations transferred with the traffic [at issue]." But there was no dispute on this subject. As

> the D.C. Circuit noted, CCI sought to transfer the traffic, but not the concomitant obligations under the plans, to PSE.

Now that AT&T has reversed itself back to stating S&T obligations must transfer on traffic only transfers, plaintiffs will demonstrate that AT&T's March 27, 2006 position is the correct one.

POINT TWO

SECTION 2.1.8 NEVER REQUIRED TRANSFERRING S&T OBLIGATIONS UPON A PARTIAL TRAFFIC TRANSFER

A. The Transferring of S&T Obligations Were "Never" Added To 2.1.8

AT&T erroneously claims that S&T obligations were added to 2.1.8 in November of 1995 however this was a clarification, not a prospective change. In reality, the evidence shows that what was actually added in November of 1995 was not the requirement to transfer S&T obligations, but the transferring of S&T liabilities that exist at the time of the transfer. This is a completely different requirement that did not affect plaintiffs' plans. Thus, whether this was a so called "clarification" or a prospective change in November 1995, makes no difference. AT&T admits as much:

> "The expressed language AT&T proposed to add in its November 1995 amendment appears as the final clause of subsection B of 2.1.8, which clarifies that "all obligations" includes "**any applicable shortfall or termination liability(ies)".**

AT&T Opp. Brf. at p. 12; Arleo Cert. at Ex. K. As one can see, the last 2.1.8 clause that AT&T cites only entails the transferring of any applicable shortfall and termination liability.

This provision only applies when all of the following are present: 1) the transfer relates to plan transfers not traffic transfers 2) Plans are being

discontinued , 3) the transferor's plans must be under its monthly pro-rata S&T obligation at the time of the transfer, and 4) **the plans are post-June 17, 1994 originated into the market, because those post plans had to meet monthly pro-rata plan obligations as opposed to fiscal year end obligations of pre-June 17, 1994 plans.** Put simply, the plan's S&T obligations are totally different than actual liabilities. Simply put: Liabilities only occur when there is a failure to meet S&T obligations. Obligations are potential – liabilities are real.

In plaintiffs' Public Reply Comments in 2003, plaintiffs addressed AT&T's initial 2003 comments and stated to the FCC:

> AT&T also states that the "shortfall will hit when the plans are either discontinued or reach their anniversary date." (Id.) But when a plan is upgraded (restructured) it is not discontinued! A plan that is restructured does NOT reach its fiscal year anniversary date! The whole point with grandfathered plans is that these plans do not have monthly pro-rata shortfall commitments. So if the plan is restructured in the 11th month, it never gets to the fiscal year end anniversary date! AT&T's comment only further solidifies the validity of our position.

Exhibit A. In plaintiffs' case the last clause of section 2.1.8 regarding S&T liabilities, not S&T obligations, would not be enacted because, as per AT&T's own admission, termination liabilities were not applicable because plaintiffs' CSTPII plans were not being terminated (i.e. discontinued). AT&T concedes as much:

> "Termination liability" refers to payment of tariffed charges that apply if a term plan is discontinued before the expiration of the term. Section 3.3.1.Q 5 of AT&T's Tariff F.C.C. No. 2. Payment of termination charges is not an issue here. (emphasis added)

AT&T May 22, 2006 Brf., p.3, fn. 1. Shortfall is only applicable when the plans are

either discontinued or reach their anniversary date.[24] The plans were not terminated and the plans had not reached their anniversary date as of the traffic only transfer. Therefore, even if this last 2.1.8 clause was deemed a clarification and not a change "C" (as indicated by the Federal Composition of Tariffs Law), this last clause has no affect on the traffic only transfer at issue.[25] S&T liabilities, if applicable, are transferred and immediately paid for as a current liability; however the actual S&T contractual obligations, (as previously evidenced per 3.3.1.Q bullet 10, which is exhibit H to plaintiffs moving brief) must stay with the transferor's

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[24] The liability clause of 2.1.8: **A post-June 17, 1994 plan had to be meeting pro rata monthly commitments when restructured/discontinued. Example: If a post-June 17, 1994 plan transfers its plan after the 5th month of its $12,000 per year obligation the post-June 17, 1994 plan would have been required to have accumulated $5000 (5 months x $1,000) by the month if simultaneously discontinuing and transferring its "plan" to the transferee. As per 2.1.8 liability clause, if the post-June 17, 1994 plan only accumulated $4,000 the applicable liability at the time of a discontinue and transfer, would be $1,000 liability. Plaintiffs' plans were never discontinued, nor were they post June 17th 1994, nor were they in shortfall.**

[25] The District Court, in its May 1995 Decision noted at page 24: **"In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do escape termination and also shortfall charges through renegotiating their plans with AT&T."** Pl. May 31, 2005 Brf. at Ex. C.

The Court stated further: **"Suffice it to say that, with regard to pre-June, 1994 plans, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff." Id. Obviously, the 6/17/94 Ruling was 6 months before the January 1995 traffic only transfer so AT&T knew plaintiffs were immune from S&T charges long before the traffic only transfer. AT&T's Fraudulent Use claims were completely fabricated.**

plan. Under the tariff, S&T plan obligations do not transfer on traffic transfers; they are obligations of the existing transferor's plan. [26]

B. AT&T Already Explained 2.1.8's S&T liabilities Are Not the Same As S&T Obligations

In its brief to the Third Circuit, AT&T provided an exhibit which is annexed hereto as **Exhibit B.** Significantly, this section of the tariff only applies to discontinuance and/or cancellation of an AT&T plan which was not being done as AT&T admits. Additionally, the handwritten notations on AT&T's exhibit, where the word "new" is circled and **June 17, 1994 was highlighted, was done by AT&T in an attempt to argue that the plans were "new" post-June 17, 1994 plans. AT&T tried to argue that the plans would become post plans; however, the pre-June 17, 1994 plans were never restructured prior to the January 1995 traffic transfer. Additionally, even if the plans were to be restructured after June 17, 1994, plaintiffs had the option to check off "Upgrade" on the AT&T contracts instead of the "new" option for the plans and continue to use the existing CSTPII plans RVPP ID to maintain its pre-June 17, 1994 grandfathered**

[26] The Mr. Fash letter stated that AT&T's Tr. 8179 proposal mandated the entire plan would have transferred on a substantial traffic transfer. Arleo Supp. Cert. (6/27/05) at Ex. D. If AT&T is correct that S&T obligations transfer on traffic transfers, why didn't AT&T under Tr. 8179 simply propose that only all the S&T obligations transfer on traffic transfers and keep the plan with transferors, since AT&T falsely claims that its position has always been that traffic transfers were allowed? The reason is simple-- no tariffed option exists to transfer S&T obligations away from the plan on traffic only transfers---S&T obligations only transfer with a plan transfer.

status.[27] **Exhibit C** shows an example of a restructured plan using the same RVPP-ID, as the AT&T cover letter states it is a restructure and the AT&T contract shows "upgrade" checked off--not "new". Additionally, all plaintiffs' contracts were yearly commitments as the exhibit C sample contract states--not monthly, so traffic could be moved without penalties. Further, **Exhibit D** evidences that plaintiffs' Option B (three year commitments) plans at issue here are not "new" plans. **A "new" plan is created only when a "new" RVPP ID is used and only upon restructuring/discontinuance of the plan as the AT&T tariff exhibit states. In contrast, if existing/old RVPP ID is used, there is a restructured/upgraded/discontinued without liability plan -- not a new plan.** That is how AT&T keeps tract of grandfathering laws by the RVPP ID of the plan. Also, **Exhibit E** is a proprietary AT&T document provided to plaintiffs by AT&T, stating plaintiffs may reuse its existing RVPP; the benefit of which was to stay grandfathered.[28] **Additionally, these plans were immune from S&T**

[27] When a plan starts another term period: The business jargon is "Restructure"; AT&T's Network Services Contract refers to it as an "Upgrade; and AT&T's tariff refers to it as a "Discontinuance"; all of these terms are synonymous.

[28] AT&T cited in its June 2005 brief, its case vs. 800 Services Inc. to show Judge Politan it charged shortfall charges. In that case, AT&T inadvertently supports plaintiffs on Page 8: "After that gambit failed, 800 Services then requested on July 21st, 1995 that AT&T permit 800 Services to "restructure" its CSTPII plan pursuant to Tariff 2. AT&T outlined the terms and conditions specified under tariff No. 2 governing such a request, (A157), and advised 800 Services to notify it if 800 Services wished to proceed. 800 Services never attempted to proceed with this request, (A137), and Okin testified that to his knowledge, 800 Services "**did not "qualify" for a restructuring"** of its plan under the terms of the governing tariff. (A141)."

AT&T counsel, who was also Richard Brown, needed to stress that 800 Services did not qualify for a restructuring. Conversely, in plaintiffs' case, Judge Politan's decision shows plaintiffs understood,

liabilities due to the fact that tariff section "2.5.7", was enacted which waives actual S&T obligations; Exhibit F.

Besides the tariff, plaintiffs have also evidenced an FCC Order that AT&T had to grandfather plaintiff's to all substantive changes which includes both the pre-June 17, 1994 issue and 2.1.8 changes. Pl. May 11, 2006 Brf. at Ex. C, p. 7 n. 3. Transferring applicable S&T liabilities was grandfathered under this FCC Order which mandated that all substantive changes be grandfathered. S&T liabilities did not apply to plaintiffs under the tariff and under FCC Order so there is no tariff to interpret. Section 2.1.8 did not transfer the actual CSTPII plans S&T obligations, only applicable S&T liabilities; applicable at the time of the transfer.[29] AT&T has stated that it has done many thousands of traffic only transfers and still AT&T has no evidence to support its position that S&T obligations transfer. To the contrary, the only traffic only transfer provided by AT&T supports plaintiffs.

C. The FCC Utilized The Obligations Language Of 2.1.8 To Interpret And Decide The Obligations Issue

The FCC's original opinion makes it clear that 2.1.8 did not apply to "how" the traffic could be transferred; it agreed with AT&T Counsel Fash's position that the accounts could be transferred under 3.3.1.Q 4; however when it came to interpreting and deciding precisely which obligations transfer, and the reasons why, the FCC clearly utilized 2.1.8 to interpret and determine "which" obligations

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and qualified for restructuring of its grandfathered plans, that were immune from S&T charges.

[29] AT&T senior counsel Charles Fash admitted in a July 3, 1996 letter wherein he stated that shortfall charges could not have been in issue at the time of the traffic transfer. See Plaintiffs' 2005 reply brief at Ex. D.

transfer. The FCC correctly understood that S&T obligations did not transfer on traffic only transfers, just the two obligations listed within 2.1.8 in Jan 1995. Indeed, the FCC stated that section 2.1.8 had "meaning" because, in regards to traffic only transfers, the only "meaning" for 2.1.8 for the FCC was due to the use of 2.1.8's obligations language; otherwise if 2.1.8 was not used to determine which obligations transfer then 2.1.8 would have absolutely no meaning at all to the FCC in regards to traffic only transfers. AT&T did not refute plaintiffs' statement that the FCC's "how" the accounts could transfer position, had any affect on the FCC's correct "which" obligations are transferred under 2.1.8 position.[30]

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[30] AT&T misleads this Court regarding its TSA amendment assertions. AT&T's initial brief to the FCC stated that the "use of the AT&T transfer form conclusively proves that 2.1.8 was used". The FCC's reply to AT&T rationalized that the notations on the transfer forms could have been an amendment to use 3.3.1.Q bullet 4 (delete and add) and not use 2.1.8 regarding "how" the traffic could be transferred. The FCC's erroneous amendment rationalization was totally different than AT&T's 2.1.8 amendment assertion; the FCC was not agreeing with AT&T's concocted assertion that 2.1.8's obligation language was being amended. The FCC simply did not understand "how" the traffic could be transferred within 2.1.8, and what forms are used to do it. The FCC only used 2.1.8 to interpret and decide "which" obligations transfer under 2.1.8. AT&T's attempt to use the FCC's totally different amendment rationalization is pure deception. AT&T gets these orders all the time and knows all its forms and the FCC does not. AT&T clearly understood plaintiffs' common order. If AT&T did not understand it AT&T is bound by section 2.1.8 to question it within 15 days in any event, which this Court's 1995 decision states AT&T failed to do. In reality there was no attempt to amend 2.1.8. The District Court's May 1995 Decision which was not vacated and thus becomes the "law of the case" makes it very clear: **"The Inga Companies and CCI followed the transfer section of the tariff to the letter,** they ought not now be forced to deal with a unilateral change of the rules by AT&T." Id. at p. 20 (emphasis added).

AT&T's Actions Speak Even Louder than Words. The February 1995 FOIA notes show that AT&T ran to the FCC to argue that S&T are in minimum payment period and when that failed tried to retroactively enact Tr. 8179 before AT&T ever notified plaintiffs' that it was denying the traffic transfer. AT&T was not even aware until plaintiffs' latter filed 1995 briefs to this Court that plaintiffs believed that S&T obligations do not transfer as per 3.3.1.Q bullet 10. The 2.1.8 transfer forms do not state anything regarding what to do with obligations and never did as there are only two options that the tariff allows (plan transfer or traffic transfer), and AT&T knows which obligations transfer for each. AT&T was expected to process the traffic only transfer in the manner it always had. AT&T failed to address plaintiffs' moving brief statements on pages 16 and 17 under "conclusion" dictating the two options under the tariff. When the DC Circuit correctly understood that

D. AT&T Has Changed Its Position Regarding Which Party Completed The AT&T 2.1.8 Transfer Forms

In its May 22, 2006 brief at footnote 4, AT&T asserts that PSE wrote "traffic only" on the AT&T transfer form. In its reply brief, AT&T states:

> As AT&T has previously explained, PSE "wrote' traffic only' on the transfer forms to make clear that it was not accepting the plans and the associated obligations for shortfall and termination changes." (emphasis added)

AT&T Reply Brf. at p. 10. AT&T itself stated on page 11 of its 1996 brief to the FCC that CCI made the notations on the AT&T transfer forms not PSE as AT&T now asserts. AT&T May 22, 2006 Brief, Ex. A. The Larry Shipp Certification also accurately states he made the notations, and explains why they were made because they are mandatory, instructional notations:

> The AT&T Transfer of Service Form (TSA) was used for several different types of transfers. Therefore as was the norm, I had to indicate on each of the TSA's, what type of transfer it was. These were "traffic only" transfers as opposed to plan transfers, as in the Inga Companies transfer to CCI whereby we specified the transfer of the accounts together with the plan. Traffic Only was the common explanation used. AT&T's conjecture that I was somehow attempting to modify the tariff is absolutely false. (Emphasis Added)

Pl. March 8, 2006 letter brief. Shipp Cert. at p. 5. AT&T's misrepresentation was made to counter the Shipp Certification, but AT&T forgot it had already documented in 1996, that CCI made the notations well before Mr. Shipp's Certification. AT&T's ploy is to falsely claim that PSE was somehow amending 2.1.8 as AT&T has falsely asserted that no obligations were transferred and then changed it to assert only one obligation was transferred. Despite AT&T providing

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2.1.8 allows traffic only transfers by default it also by decided which obligations transfer because there are only two options under 2.1.8. AT&T was not told by plaintiffs until it filed its claim that it expected that the S&T obligations stay with the CSTPII plans. It is obvious by AT&T's own actions that the only reason it ran to the FCC was to attempt to retroactively stop the entire industry from transferring its traffic to CT516 to obtain better rates.

CCI's Shipp with a huge compensation package to in part help AT&T defend itself against the Inga Companies, Shipp refused to perjure himself to help AT&T. AT&T also settled with PSE and possibly AT&T believed PSE would be "more cooperative" than Mr. Shipp so AT&T stated that PSE made the notations on the TSA not CCI. The only thing that PSE wrote was the cover letter that went with the AT&T transfer forms and nowhere did PSE or CCI state that it was attempting to amend the obligation provisions of 2.1.8. Furthermore, PSE's Vice President Pat Bello, in a just obtained Certification, confirms that PSE was accepting all obligations associated with a traffic only transfer:

> As AT&T's customer of record under Contract Tariff No. 516, PSE is also directly liable to AT&T for the charges incurred for the outbound and 800 usage of AT&T services by PSE's customers, including the traffic transferred to CCI by Winback which would have been included in the traffic CCI seeks to transfer to PSE.

Exhibit G.

Additionally, plaintiffs' further reply comments to the FCC, in 2003, also confirmed its intent to transfer all obligations listed:

> The "new customer" assumes all obligations of the former customer at the time of transfer or assignment. These obligations include: (1) all indebtedness for the account numbers specified in the TSA and 2) the unexpired portion of any applicable minimum payment period(s)

Exhibit H. Of course, the FCC, the DC Circuit and the District Court in 1995 also noted that the two obligations within 2.1.8 were transferred. As the Court will see infra AT&T also stated to the Third Circuit that the traffic only requirements of 2.1.8 were met.

E. AT&T Changes Its Position Again Regarding Where In 2.1.8 Its Alleged S&T Obligations Are

In its opposition to this motion, AT&T states:

> In yet another attempt to mislead, plaintiffs suggest that AT&T's clarification defense is "bogus" and has not been consistently maintained because AT&T did not argue to this Court or the FCC "that S&T obligations are encompassed within minimum payment period." Motion at 13. But AT&T's consistently maintained position is that these obligations are encompassed within the phrase "all obligations," not the phrase "minimum payment period."[31] (emphasis added)

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[31] **Including But Not Limited To:** Section 2.1.8 in effect in Jan 1995 uses the words at B) ["These obligations include,"] and lists the only two obligations required transferring. The

AT&T Opp. Brf. at p. 12-13, fn. 3. It is AT&T again misleading this Court, not plaintiffs. AT&T initially argued to the FCC in 1995 before it lost its Substantial Cause Pleading that transferring S&T obligations were encompassed within minimum payment period as the FCC FOIA indicates:

> Moreover, the unexpired portion of any applicable min pay period would not seemingly include unexpired portion of any term of service and usage or rev commit but has its own unique meaning and, therefore, the provision about the term plan and commitments being included as part of the min pay period in conflicting and we find in favor of customers in cases of conflicts. (emphasis added)

Pl. May 11, 2006 Brf. at p. 6. AT&T in 1995 had obviously asserted to the FCC in its' Substantial Cause Pleading that S&T obligations were encompassed within minimum payment period and the above FCC notes show the reaction from the FCC in preparation for its meeting with AT&T.

Plaintiffs correctly state in their re-argument motion that AT&T's briefs from 1996 through the DC Circuit decision never maintained the same AT&T position that transferring S&T obligations were encompassed within 2.1.8's second obligation--- minimum payment period. AT&T cannot refute plaintiffs' statement that AT&T cannot provide examples of a maintained position on where these S&T

FCC FOIA notes correctly state that if AT&T did not want to limit itself it commonly used the phrase: (including, but not limited to:) as it does in other tariff sections as here: "AT&T Tariff Section 2.2.8. Use of AT&T Marks – Unless otherwise allowed pursuant to Section 2.2.5, preceding, when WATS is resold, neither the Customer nor any other reseller or intermediary in the sales chain between the Customer and an end user may make any use, **[including, but not limited to]** use in advertising, promotional materials, Internet…" (emphasis added)

Therefore, in Jan. 1995 when AT&T used only the words: "These obligations include:" AT&T knew it was limiting itself to just those obligations subsequently indicated. This answers this Court's inquiry as to whether the obligations list is exhaustive. Bassler Decision at pg. 14.

obligations supposedly are. The two District Court Opinions, the Third Circuit Decision, the FCC Decision and the DC Circuit Decision do not reflect AT&T stating that transferring S&T obligations were within minimum payment period(s). Obviously, AT&T did not make that same nonsensical argument because it lost that argument to the FCC in its Substantial Cause hearing. However, after plaintiffs produced AT&T's November 1995 prospective changes to 2.1.8, AT&T needed to revert back to the old position that S&T obligations are within 2.1.8's second obligation "minimum payment period." This time, however, AT&T added a new twist that only the indebtedness obligation was transferred because if S&T were encompassed within the minimum payment period that of course would mean under AT&T's theory that if S&T obligations were actually transferred. Thus, for the first time ever, AT&T stated that plaintiffs did not transfer the second obligation which according to AT&T includes the requirement to transfer S&T obligations. Amazingly, AT&T argued that it did not transfer the traffic in 1995 based upon a comment by plaintiffs taken out of context ten years later in 2005. Indeed, AT&T has clearly taken the position that S&T volume requirements are within the minimum payment period of 2.1.8:

> First section 2.1.8 requires assumption of all obligations of the former customer, including (1) outstanding indebtedness and (2) "the unexpired portions of any minimum terms of service period." But the Inga Companies asserted that only the latter obligations must be assumed and that the term and volume requirements at issue here not matters that had to be assumed, relying on the irrelevant ground that the minimum term for other WATS services under the tariff is one day. JA 187 (See Tariff No 2 Section 2.5.5, Brown Aff., Ex. C)

AT&T June 13, 2005 Brf. at p. 7-8. AT&T placed quotes around the second obligation above to focus on and deliberately misstated it as "service period" than

"payment period" to further give the impression that S&T obligations are somehow within minimum payment period:

> Under their view, the Court should now determine such matters as whether the phrase "all obligations" in section 2.1.8 somehow excludes minimum volume/term commitments; whether these commitments are part of the minimum payment periods" within the meaning of section 2.1.8

Id. at p. 2, para. 3

> (2) that the term and volume commitments that give rise to shortfall/termination liabilities are not unexpired portions of minimum payment periods,

Id. at page 12, para. 2. AT&T, scrambling for a defense, simply revised the old 1995 FCC defeated argument that transferring S&T obligations was somehow within minimum payment periods. AT&T's re-argument reply brief now claims:

> AT&T's consistently maintained position is that these obligations are encompassed within the phrase "all obligations," not the phrase "minimum payment period.

AT&T Reply Brf. at 12-13, n. 3. It is obvious that AT&T is creating new defenses and constantly changing positions. Only after plaintiffs presented this Court the FCC FOIA notes, the Meade Certification, the Fash letter and Carpenter quotes, AT&T now needs to again change its' position and "move" where the S&T obligations "supposedly" are within 2.1.8.

This Court was also obviously swayed by AT&T's prior position as it stated an analysis was needed to see what those obligations include:

> This determination requires an analysis of whether the obligations mentioned in § 2.1.8 is an exhaustive list and what those obligations include.

Bassler Decision at p. 14. However, there is no longer any need for this Court to look into what minimum payment period includes because AT&T is now stating that transferring S&T obligations are no longer within minimum payment period. AT&T now states "all obligations" under 2.1.8 means transferring S&T obligations.

AT&T puts the cart before the horse: Section 2.1.8 does not say "includes: all obligations." It requires all the obligations on what is included to be transferred. As AT&T counsel Carpenter explains infra: "all obligations pertain to only what is transferred[32].

Plaintiffs' have reason to believe that many thousands of AT&T TSA's are within AT&T's database and none show S&T obligations transferring. The Court needs to lift the stay and AT&T business executives and possibly certain AT&T counsel

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[32] Section 2.1.8 in Jan 1995 Stated:

> Transfer or Assignment – WATS, including "**ANY"** associated telephone number**(s),** may be transferred or assigned to a new Customer, provided that:
>
> A. The Customer of record (former Customer) requests in writing that the Company transfer or assign WATS to the new Customer.
> B. The "new Customer" notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s).

The D.C. Circuit stated:

> This section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS--- the telephone service itself.

Id. at p. 7. The D.C. Circuit and the FCC did not see on its face where in 2.1.8 it allowed partial subsets of traffic to transfer because it is very easy to miss. The differentiation is actually in the "any" number(s) of accounts that the new customer accepts. Any can be one, some, or most, without specification, that can be transferred. If 2.1.8 only allowed plan transfers the word "any" would have to be changed to ALL and the singular option Number would be the plural option: Numbers.

"All obligations" pertain to, or as AT&T counsel Mr. Carpenter stated depends upon, what is transferred. Under 2.1.8 at "B" "the "new" Customer notifies the Company" (Company=AT&T), what it has accepted (traffic or plan) and is then of course is obligated for "all the obligations" on "**that which it accepts."** Of course, shortfall and termination obligations are not transferred/assumed because these obligations are the Transferor Customer's obligations as per (3.3.1.Q bullet 10) that cannot be transferred from the Former AT&T Customers (plaintiffs), as AT&T admitted the plans were not being transferred or terminated. If the D.C. Circuit had seen on its face the differentiation, then it would have easily understood that para. "B" pertains to what (how much traffic or the plan), is accepted and reported by the new customer to AT&T.

should be deposed. Their testimony will verify AT&T has been blowing smoke over this Court, and all other Courts and the FCC.[33]

F. AT&T's Theory that S&T Obligations Transfer On Traffic Only Transfers Is Commercially Not Feasible

Under AT&T's misguided theory, the tariff would allow:

Scenario I: Transferor "A" with a $50 million S&T obligation sets up a Company "B" that takes out a plan with a puny $1,000 a year S&T obligation, that does not even require a deposit. Company A transfers a handful of accounts to Company "B" and according to AT&T's position A's $50 million in S&T obligations go to "B". Company "B" goes out of business and "A" has no more $50 million in S&T obligation but has all its traffic to send to an AT&T competitor. As opposed to actual reality where the transferor must keep the S&T obligations and are subjected to

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[33] **AT&T's Previous Position was that Section 2.1.8 Did Not Permit Traffic Only Transfers**
AT&T's reply brief of course failed to address the fact that Mr. Fash stated that section 2.1.8 does not permit traffic transfers, but recommended to its customers to use 3.3.1.Q bullet 4(delete and add) which was the very thing that the DC Circuit stated would eviscerate and create an "end around" 2.1.8.

Additionally, AT&T account manager Joyce Suek on 6/20/1995 stated the following by fax seen here as **Exhibit I** ---- "Al --Per our Conversation, 6/19; an original TSA is now required for transfer activity. Additionally we no longer process partial TSA's, the TSA must be for the whole plan. Joyce Suek"

Additionally plaintiffs' submitted in its re-argument motion at Exhibit I, letters to the FCC from attorney Colleen Boothby who represented other aggregators. Ms. Boothby also states that AT&T stopped traffic only transfers under 2.1.8, and was already utilizing Tr. 8179 to mandate a plan transfer; despite the fact that Tr. 8179 was denied by the FCC in AT&T's loss of its Substantial Cause Pleading, so AT&T withdrew Tr.8179 in the face of adverse determination.

This Court noted: "AT&T concedes (and has always conceded) that § 2.1.8 of Tariff No. 2 applies to the proposed transfers. AT&T's Memorandum in Opposition to Motion to Lift Stay ("AT&T Mem.") at 2." (emphasis added)

The Court now has ample evidence to see that AT&T has not always conceded that § 2.1.8 of Tariff No. 2 applies to the proposed traffic transfers. AT&T stopped processing traffic only transfers completely for many aggregators. This is also why Judge Politan's question was worded: "Whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction."

lose any deposit that it had to pay to obtain the $50 million plan.

Scenario II: Same company A has three smaller aggregators "D", "E", and "F", all who have small plans, $1 million, $2 million and $3million respectively. The smaller companies only want $200,000 worth of traffic transferred to them. In AT&T's wacky world, these assuming companies would never take in $200,000 in traffic if they had to absorb $50 million in S&T obligations with it. Additionally, AT&T would have obtained an additional $100 million in S&T obligations ($150 million to transferees - $50 million from transferor) as under AT&T theory each would get A's full S&T obligations. AT&T actually expects an experienced Court to believe this. AT&T claims it has done tens of thousands of traffic only transfers but of course fails to show one shred of evidence that S&T obligations transfer on traffic only transfers.

G. AT&T Attempts To Cover-Up Its Counsels' Mr. Meade And Mr. Carpenters' Admissions That S&T Obligations Do Not Transfer On Traffic Only Transfers

AT&T asserts that the tariff change that AT&T sought to enact (Transmittal 8179) would have been added to 2.1.8 under paragraph "C" and not "B" and that this would have no affect on the obligations language under paragraph "B". Again, AT&T's assertion is total nonsense.

AT&T in its opposition brief states:

> In short, it was the proposed change to subsection C that the FCC believed "would" constitute a substantive tariff change," id at 4 para. 9 not the addition of an express reference to shortfall and termination obligations in subsection B. (emphasis added)

Id. at p. 12-13. AT&T attempts to convince this Court that if the Tr. 8179 went into effect as paragraph "C" under 2.1.8, it would have had no impact on para. "B" because they are two "*different*" paragraphs of 2.1.8. Absolute nonsense. The proposed Transmittal 8179 was an amendment to 2.1.8, that was not allowed by the FCC, but if passed would have changed the status quo of 2.1.8, and would have required S&T obligations to be transferred directly affecting 2.1.8's para. "B"s obligations language for substantial traffic only transfers. Transmittal 8179 (annexed at plaintiffs' re-argument brief, pg.7, exhibit C) would have mandated that

when substantially all of the traffic was transferred it would require that the plan and it's associated S&T obligations would have to be transferred. A plan transfer would have been required, not just a traffic only transfer. However, AT&T lost its Substantial Cause Pleading to the FCC as Mr. Meade, and Mr. Carpenter, confess and thus the status quo of para "B's obligations language remained the same: S&T obligations did not transfer on traffic only transfers, no matter how many accounts were transferred.

Obviously, if there was a *different* provision already within 2.1.8, prior to the filing of Tr. 8179, that mandated S&T obligations transfer on traffic only transfers, AT&T would not have attempted to file Transmittal 8179 retroactively. Common sense mandates that if AT&T actually had *different* language within 2.1.8 to stop the partial traffic only transfer, there would have been absolutely no reason to 1) first misrepresent to the FCC that S&T was in minimum payment period and then 2) File Tr. 8179 seeking retroactive status. If Tr. 8179 went into 2.1.8 as a "C" paragraph is totally irrelevant. It does not change the fact that AT&T was attempting to "change" the status quo as 2.1.8's para "B's" obligations language as para "C" would have imposed stipulations upon and thus substantially changed what occurs under para "B" on substantial traffic transfers. Mr. Meade's and Mr. Carpenter's admissions that AT&T lost the Substantial Cause Pleading must be taken for what they are, admissions that AT&T was not allowed by the FCC to retroactively change the Jan 1995, status quo of 2.1.8 and therefore S&T obligations did not transfer of partial traffic transfers.

H. AT&T Further Misleads Court Asserting That Plaintiffs 2.1.8 Transaction Was Somehow Different Than The Entire Industry

In its opposition brief, AT&T states:

> The only "evidence" plaintiffs' cite for the first of these propositions is Mr. Meade's statement that "[u]nder CCI's requested location transfer, CCI would have nominally remained the customer of record for the CSTPII's" and thus would have remained liable for "shortfall and termination charges." Motion at 8 (quoting Meade Certification at para. 6, emphasis added). The highlighted term above makes clear, however, that Mr. Meade is describing the transaction that plaintiffs had proposed, not how section 2.1.8 applied to such transfers.

Id. at p. 10. AT&T's position is nonsense. In a February 16, 1995 letter to David Nall, Meade states:

> AT&T is filing "at this particular time" to prevent a transaction that (at the minimum) elevates form over substance in an effort to avoid payment of shortfall charges.

AT&T May 22, 2006 Brf. at Ex. B. Clearly, Mr. Meade is saying that plaintiffs followed the correct "form" (i.e. correctly followed procedures of 2.1.8), but AT&T had concerns over the substance, i.e., the size of the transfer. The traffic only transaction that plaintiffs attempted indeed followed proper form as it was strictly in accordance with section 2.1.8 and, therefore, caused AT&T to attempt to retroactively initiate Transmittal 8179; which would have the broad effect of changing the obligations language for the entire industry (not just the plaintiffs) to prohibit a substantial traffic only transfer. If only the plaintiffs were allegedly violating 2.1.8, AT&T would not have sought an industry wide change. The FCC's FOIA notes for AT&T's Substantial Cause Showing made this same exact point:

> This raises the question of why two tariffs and various term plans that affect far more than this one reseller, need to be changed if the problem only involves one isolated reseller, who of course, is mad at AT&T.

Exhibit J. AT&T's counsel Mr. Meade himself stated it was a broad effect:

> The FCC was concerned that the modified language in Section 2.1.8(c) would have had a "broader effect" than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and so would constitute a substantive tariff change. (emphasis added)

Pl. Re-Argument Brf. at Ex. D. AT&T's assertion that Mr. Meade and Mr. Carpenter were referring only to some different transaction is sheer fantasy. Mr. Meade made it clear that the industry wide proposed change of 8179 was decided against AT&T by the FCC then replaced with Transmittal 9229, and "after extensive industry wide participation" the new concepts within 9229, that transmittal "would not be determinative of the issue presented on the CCI/PSE transfer":

> The Deposit for Shortfall Charges included in Transmittal No. 9229 is a new concept that meets AT&T's business concern more directly, without addressing the question of intent. Because this is new, it will apply only to newly ordered term plans, and so would **not be determinative** of the issue presented on the CCI/PSE transfer. (emphasis added)

Arleo Cert. at Ex. D, p. 16. Mr. Meades' explanation was quite clear that S&T obligations would not transfer on traffic only transfers under 2.1.8 unless Tr. 8179 was retroactively enacted and Tr. 9229 would not be determinative of the traffic only transfer to PSE. Mr. Meade agreed with AT&T's March 27th 2006 position that S&T obligations do not transfer on traffic only transfers.

This Court also clearly understood that Tr. 8179 was to clarify 2.1.8 for the entire industry and not just plaintiffs as AT&T attempts to mislead this Court into believing. AT&T simply did not want to prospectively memorialize for Judge Politan the legitimacy of the transaction so AT&T withdrew Tr. 8179, to delay the case, as the Third Circuit opinion and Judge Politan's opinion states in an effort to put

plaintiffs out of business as a leading industry publication detailed at **Exhibit K**. As this Court noted:

> Furthermore, AT&T had submitted transmittal 8179, a proposed tariff change that it claimed would clarify the requirements of § 2.1.8. Therefore, the Court was further persuaded to hold off deciding the CCI/PSE issue while awaiting the FCC's decision on transmittal 8179. (emphasis added)

Bassler Op. at p. 8. AT&T sought not clarification but retroactive change for the entire industry, not due to just plaintiff's transaction as AT&T asserts. This Court noted further:

> After Judge Politan's May 2005 ruling, however, AT&T withdrew transmittal 8179 purportedly after the FCC advised AT&T that the transmittal would have prospective effect only. On October 26, 1995 it filed a second transmittal offering proposed revisions to clarify six of AT&T's tariffs. (emphasis added)

Id. This Court is correct that the change was prospective only and would have no effect on plaintiffs but it provides this Court with the evidence it needs to see what AT&T was attempting to do by changing 2.1.8's norm that S&T obligations do not transfer on traffic only transfers. Mr. Carpenter's statements to the Third Circuit also directly coincide and support Mr. Meade's statements.[34]

I. AT&T Counsel Mr. Carpenter Answers What "All Obligations" Means And Confirms What Obligations Transfer Depends Upon What Is Transferred

AT&T attempts to cover the statements of its counsel Mr. Carpenter to the Third Circuit, regarding the fact that S&T obligations do not transfer on traffic transfers. It states:

> His use of the word "all" cannot plausibly be understood, as plaintiffs appear to suggest, as a concession that 2.1.8

[34] In its reply brief, AT&T refers to additional changes made to 2.1.8, that were proposed under Tr. 9229 that prospectively went into affect in November 1995. The amendments to the tariff were all indicated by a "C" for prospective change not as a "T" for text changes that don't change rates or regulations under Federal Composition of Tariff Laws. AT&T's Mr. Meade agreed that these amendments were under Transmittal No. 9229 and thus were not determinative of the traffic only transfer from CCI to PSE, and AT&T itself stated these were changes not clarifications: AT&T stated: "I attach hereto as Exhibit A, a copy of selected pages of AT&T Tariff F.C.C. No. 2 with effective dates of November 9th, 1995, which I understand contain some "changes" implemented by Tariff Transmittal No. 9229. (emphasis added)

The FCC's decision was clear that no changes after January 1995 would affect plaintiffs' transaction: "We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern resolution of this matter. Ex. G to plaintiffs' May 31st 2005 moving brief at p. 11 (emphasis added)

> does not apply if a customer transfers all traffic save that associated with one location.

AT&T Opp. Brf. at p. 13. AT&T knows that as long as the plan does not transfer it is a traffic transfer. AT&T knows full well that Mr. Carpenter knew exactly what he was talking about when he stated S&T obligations only transfer on plan transfers, not traffic only transfers. AT&T counsel Fash also explained with just an account on the plan it leaves the plan structure in place, therefore constituting a traffic only transfer not a plan transfer.

Mr. Carpenter also made other statements to the D.C. Circuit to confirm that he fully understood the tariff when he was asked what "all obligations" meant. Mr. Carpenter correctly explained what "all obligations" meant varied, depending upon what's transferred.

> Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.

> Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

Exhibit L.

Id. Mr. Carpenter was again confirming, as he did in the Third Circuit (Pl. Re-Argument Brf. at Ex. E), that shortfall and termination obligations only transfer when there is a plan transfer not a partial traffic transfer. AT&T is currently asserting that no matter whether a partial traffic transfer or a plan transfer is ordered, the S&T obligations must be transferred - no variation. The tariff does not even allow S&T obligations to transfer without the plan, as AT&T wants the Court to believe. AT&T's counsel Mr. Meade and Mr. Carpenter and Mr. Fash agree with plaintiffs and AT&T's March 27, 2006 agreement with Mr. Shipp's position. Any disputes by law must be construed against AT&T.

J. AT&T Creates New Bogus Defense For Counsel Fash -- AT&T Asserts Joint And Several Liability Remain With Transferor On "Traffic Only" Transfers

In its opposition brief, AT&T states:

> Finally, there is no merit to plaintiffs' tortured reading of a 1995 letter written by another AT&T attorney. As AT&T has explained, section 2.1.8 provides that the transferor remains jointly and severally liable for shortfall and termination obligations. (emphasis added)

AT&T Opp. Brf. at p. 14. AT&T has never explained until now that the obligations that it has always sought from plaintiffs (that stay with the transferor's plan on traffic only transfers) are not actual S&T obligations but joint and several liability obligations. AT&T conjures up yet another newly minted defense in response to the Fash letter but as usual it fails. Under 2.1.8's "remaining jointly and severally liable" clause the transferor would be dependent upon the transferees ability to meet the transferors former S&T obligations, but only on a plan transfer, not a traffic transfer. AT&T stated to the FCC in 2003:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the *transfer* of such accounts the Petitioners would, **but for** the attempt to bifurcate the traffic from the underlying plans, remain jointly and severally liable with the new customer for all obligations existent at the time of the transfer. May 19th, 1995 Order at 6, AT&T Tariff F.C.C. No. 2 Section 2.1.8.

Exhibit M. This is true. If plaintiffs transferred the plan and not just the traffic, plaintiffs would remain jointly and severally liable for the transferred S&T obligations; but because plaintiffs did not transfer the plans S&T obligations, plaintiffs were not "jointly and severally liable" for the S&T obligations not transferred, plaintiffs knowingly took full responsibility for the "actual" S&T obligations. Also AT&T's reference to "all obligations" here is obviously implying the inclusion of S&T obligations if the plan was transferred. This is yet, another admission that S&T obligations do not transfer. But for AT&T's misrepresentations

this case would have been over long ago.

Under AT&T's scenario, AT&T asserts that under a traffic only transfer the actual S&T obligations transfer to the transferee and the transferor retains only the non-controllable joint and several liability obligations. This is totally absurd and of course unsupported by AT&T evidence. This was not the situation that Mr. Fash was describing. Mr. Fash clearly states that AT&T would look to US Communications, the transferor, for the actual S&T obligations:

> It appears to AT&T at this juncture that transfer of all but two of the locations as requested by Mr. Swain would render not only the plan, but Darren B. Swain, Inc., an empty shell *devoid* of assets with which to pay tariffed charges "associated with the plan."

Pl. Rearg. Brf. at Ex. G, p. 2. Additionally, if actual S&T obligations really did transfer from US Communications to the Inga Companies, AT&T wouldn't have cared, as the Inga Companies who were the industry leaders would be responsible for the actual S&T obligations. However, since Mr. Fash explains that the actual S&T obligations do not transfer on traffic only transfers, that is why Mr. Fash was questioning the transaction. The US Communications to Inga Companies traffic only transfer was also a traffic only transfer, as the CCI-PSE traffic transfer, and AT&T had the same response to deny that transaction. Additionally, the letters from Colleen Boothby (Pl. Re-Argument Brf. at Ex. I) show that other aggregators were also being stopped by AT&T from transferring traffic only, that AT&T had processed in the past. These facts also clearly show that the CCI-PSE traffic transfer was an acceptable industry wide transaction despite AT&T's incredible claims that plaintiffs' only were attempting to amend, and not comply with 2.1.8. AT&T has never made one statement that the transferors' S&T obligations are only "joint and several" obligations on traffic only transfers. It is a deliberate mischaracterization of Fash's comments in an attempt to cover up his clear admission that S&T obligations do not transfer on traffic only transfers.

K. Section 2.1.8 E (c) -- Joint And Several Liability Tariff Language Conclusively Establishes That Actual S&T Obligations Do Not Transfer On Traffic Only Transfers

AT&T section 2.1.8.E addresses joint and several liability for only plan transfers, however AT&T's new theory asserts that joint and several liability can also be applied to traffic only transfers. Even if AT&T's theory were true, plaintiffs

plans would not have any joint and several liability remaining anyway under 2.1.8 E (c):

> If the service being transferred or assigned is subject to an AT&T term plan, flex plan, or other discount plan with revenue or volume commitments offered under this Tariff, or a Contract Tariff under which WATS is provided (a Pricing Plan), then, to the extent specified in (a) through (c) following, the Current Customer is relieved of liability for charges that may be incurred after the Effective Date of the transfer, either as a result of a failure to meet revenue or volume commitments or monitoring conditions associated with such Pricing Plan (Shortfall Charges) or as a result of the discontinuance with liability of such Pricing Plan (Termination Charges).
>
> (c) For a Shortfall Charge incurred for a commitment period after the commitment period that includes the Effective Date of the transfer, or for a Termination Charge incurred at least 180 days after the Effective Date of the transfer, the Former Customer is fully relieved of liability.

Exhibit N.

AT&T and plaintiffs both agree that standard "joint and several liability law" mandates that the transferor remains jointly and severally liable for the actual S&T obligations that transfer to the transferee as in a plan transfer. An examination of Section 2.1.8 E shows that it covers joint and several liability and that 2.1.8E clearly details that joint and severally liability **only pertains plan transfers**, not traffic only, "location" transfers. There is only one conclusion -- the fact that 2.1.8E does not mandate joint and several liability remaining with transferor on traffic only transfers is conclusive tariff evidence that actual S&T obligations do not transfer on traffic only transfers; because the transferor maintains actual S&T obligations, not joint and several liability obligations. AT&T's laughable excuse that Mr. Fash was referring to "joint and several liability" remaining with the transferor on traffic only transfers, just served to compel plaintiffs to provide more evidence to conclusively prove S&T obligations do not transfer on traffic only transfers.

L. If 2.1.8 Covered Joint And Several Liability On Traffic Only Transfers Plaintiffs Plans Would Have Been Exempt Anyway

If AT&T's theory is correct that the transferor's S&T obligations were not actual obligations but only joint and several liability obligations on traffic only transfers; plaintiffs' plans were exempt from joint and several liability charges under 2.1.8 E (c) anyway: As per the July 3, 1996 Fash letter (Ex. D on pg. 3, fn. 2 in plaintiffs' June 2005 reply brief), plaintiffs' fiscal year end was April 1st 1995 through March 31st 1996. As per 2.1.8E (c), this commitment period was a "commitment period after the commitment period that includes the Effective Date of the transfer." Specifically: The effective date of the transfer was Jan. 1995 which of course was within the prior April 1994 – March 31st 1995 commitment period. Therefore, according to AT&T's new position -- plaintiffs had no joint and several liability anyway. Under AT&T's scenario, AT&T of course knew what plaintiffs' commitment periods were, and that plaintiffs would have been relieved of AT&T alleged joint and several liability on S&T obligations long before the CSTPII's plans previous fiscal year ends. Therefore, even under AT&T's lame excuse for Mr. Fash, that the S&T obligations were not actual, but only joint and several liability obligations, AT&T couldn't have possibly justified claiming that it was denying the traffic transfer for fear of being defrauded of joint and several liability S&T obligations, because there clearly wouldn't have even been S&T obligations applicable. AT&T's newly minted excuse for the Mr. Fash admission is pure nonsense. The new Fash evidence clearly shows that AT&T understood that actual S&T obligations do not transfer on traffic only transfers.

There is additional new evidence as well. The following quote from another AT&T counsel similarly shows that S&T obligations stay with the plans:

> We have reason to believe that Mr. Inga is attempting to transfer end users from existing plans that have over $50 million of commitments. Mr. Inga's efforts to transfer these end users and leave the plans intact with their commitments, appears to us to be an attempt to defraud AT&T by obtaining the benefits of a transfer of service and at the same time deprive AT&T of the commitments made to obtain that service. AT&T will not tolerate that conduct. AT&T will seek to enforce its rights in the event shortfall and termination charges become due under the tariff and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its tariff charges."

Exhibit O. There is only one conclusion. S&T obligations remain with the plans and do not transfer upon partial traffic transfer. The evidence is simply overwhelming.

M. AT&T Asserts That The Two Obligations Within 2.1.8 Were Not Transferred But The Record Conflicts With AT&T's Previous Statements

In its initial brief to the Third Circuit, AT&T argued:

> In fact, AT&T is not merely at risk for non payment of the usage charges themselves, which are indeed paid by end users directly to AT&T, but also for plaintiffs' shortfall and termination charges, which can only be paid by plaintiffs from the revenues they would lose as a result of the transfer.

Exhibit P.

The above statement as well the following AT&T quote also confirms that S&T obligations have to stay with the plan which was not being transferred; also the AT&T quote below references the same 3.3.1.Q tariff page that plaintiffs referenced in its moving brief.

Further, in its reply comments to the FCC, AT&T stated:

> As AT&T's customers-of-record, Petitioners were responsible for the tariffed shortfall and termination charges. Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003

("AT&T's Further Comments 2003") at 7-8.

This Court's Opinion also clearly understood actual S&T obligations remained on the transferor's CSTPII plan as they would be an obligation of the plaintiffs:

> Under the plan, if Plaintiffs fail to meet their volume commitments they are accessed "shortfall" charges, which amount to the deficiency in usage over the "contract term". Additionally, if a plan is prematurely terminated the aggregator is liable for a "termination charge." (emphasis added)

Bassler Op. at p. 3. True, correct, and shortfall charges could only occur if either the aggregator did not meet its obligation at the fiscal anniversary year end or did not restructure prior to end of contract term.

> AT&T also refused the second transfer ("CCI/PSE transfer") on the ground that by transferring the 800 traffic without the plans, CCI was effectively avoiding any shortfall or termination charges. AT&T claimed that without the revenue generated by the traffic under the plans, CCI would have no income and no means of backing the responsibilities it maintained after the CCI/PSE transfer of traffic was executed. (emphasis added)

Id. at p. 6.
This Court is correct: the "responsibilities it maintained "after" the CCI/PSE transfer of traffic was executed."

As AT&T admitted to the FCC in 2003, 2.1.8E's joint and several liability does not apply to traffic only transfers and therefore the actual S&T obligations stay with transferor; as AT&T's March 27th 2006 agreement with Mr Shipp states. This Court's decision is correct that actual S&T obligations stay with plaintiffs' plans on traffic only transfers.

N. AT&T Asserts That The FCC failed To Consider §2.8.2, Which May be Used To Deny Additional Service In The Case Of Suspected Fraud

AT&T's claim that it was going to be defrauded of fiscal year end "non rendered service" shortfall charges is belied by the fact that the plans are clearly immune by both tariff and FCC Order. The cart has been before the horse as AT&T was allowed to argue Fraudulent Use before it ever convinced any Court or the FCC that it was sure to obtain S&T liabilities. AT&T had absolutely no right to claim

potential shortfall liabilities in the first place. Still, AT&T believes that this Court's decision gives it the right to again argue Fraudulent Use despite that it has already argued all of its Fraudulent Use sections. See **Exhibit Q** (AT&T's 1996 Comments pg 11 n.11 - Exhibit A to AT&T's May 22nd 2006 brief) which clearly shows 2.8.2 was argued. See also AT&T's 2003 Further Comments pg. 5 where sections 2.8.1 and 2.2.4 are also argued. AT&T cannot be permitted to argue Fraudulent Use again, as the FCC Decision was not overturned regarding AT&T's illegal remedy. Additionally, the FCC's D.C. Circuit brief (as stated in plaintiffs 2005 reply brief pg. 4, n. 3) stated in regard to 2.8.2:

> it is common sense that moving traffic away from CCI cannot be considered a denial of "additional service" to CCI. Similarly, PSE cannot be subject to the sanction of denial of service under its tariff for any alleged non-payment of charges by CCI .

O. Industry-Wide Petitions Defeated AT&T's 2.1.8 Proposals

Plaintiffs have just obtained petitions that were sent to the FCC to reject AT&T's proposed changes to 2.1.8. Petitions from 7 aggregators including, the National Telecom Resellers Association (which represented hundreds of aggregators), CCI, PSE, The Furst Group, and the Inga Companies, have been obtained. These petitions were not seen by the D.C. Circuit.

AT&T counsel Meade's Certification to Judge Politan gave the impression that AT&T was not seeking to delay but was "working with and getting feedback" from the entire aggregator industry. The petitions tell a totally different story. Anger was evident as AT&T's proposed 2.1.8 changes were figuratively ripped to shreds by the industry. The industry petitions were in response to AT&T's Meades' letter of Feb.16th 1995 to the FCC's David Nall, (this letter is exhibit B to AT&T's May 22nd 2006 brief), and made it clear to the FCC that: 1) S&T obligations stay

with the plan 2) These were definite changes, not clarifications, 3) there was no provision already within 2.1.8 that would prohibit substantial transfers, as TR8179 was to be AT&T's only solution to counter plaintiffs if retroactively allowed. 4) Deposit requirements were added prospectively to 2.1.8 in May 1996 and were not applicable against plaintiffs in any event as AT&T falsely asserts. 5) The tariff did not have the option to transfer S&T obligations without transferring the plan; therefore when the D.C. Circuit ruled 2.1.8 allows both traffic only and plan transfers it automatically decided which obligations transfer. 6) These were industry changes, not just for plaintiffs and 7) addressed in great detail the fact that substantially all the traffic was attempted to be transferred and gave many legitimate reasons why transferring substantially all locations could **not** be considered a fraudulent use. **Exhibit R.**

Plaintiffs believe the evidence presented already evidences the above points and, therefore, plaintiffs did not want to burden the Court with another 55 pages of evidence against AT&T. However, if the Court would like the aggregator petitions which led to the FCC's denial of AT&T's "so called 2.1.8 clarifications," plaintiffs are more than willing to provide them. The reason the FCC gave plaintiffs the letter to give to this Court stating that this case is not a remand, is due to the fact the FCC has already decided based upon the same 2.1.8 obligations section "which" obligations transfer.

P. AT&T Fails To Address These Undeniable Facts

(1) AT&T offered no reply as to why all the 2.1.8 changes submitted by AT&T to the FCC and obtained under FOIA all indicate the changes were grandfathered. Pl. moving brief at Ex. F. Likewise no reply was offered as to why Mr. Meade stated all changes were prospective as to plaintiffs.

(2) AT&T offered no reply to plaintiffs' moving brief, Exhibit B, which shows plaintiffs had met its 1994-1995 fiscal year ends. Additionally, since the obligations were annual and not monthly obligations plaintiffs could obtain an additional 38% on $54 million which is well over $1 million per month.

(3) AT&T offered no reply to plaintiffs' moving brief, Exhibit C, that correctly stated that due to AT&T failure to get Tr. 8179 enacted it simply meant that the status quo remained the same and S&T obligations did not transfer on traffic only transfers.

(4) Plaintiff challenged AT&T on page 13 of its moving brief to show one AT&T statement made prior to the DC Circuit that plaintiffs did not transfer indebtedness and unexpired minimum payment period and AT&T was unable to do so. AT&T created its "no obligation" and "one obligation" was transferred defenses when it needed to attack the FCC's and AT&T's own "proper mechanism' (delete and add 3.3.1.Q4) account transfer methodology and thereby promoting plaintiffs 2.1.8 transaction to the DC Circuit and this Court.

(5) AT&T never replied to plaintiffs' moving brief, pg. 13:

> Therefore, whether the AT&T's endorsed 3.3.1.Q bullet 4 "delete and add" position was used or plaintiffs section 2.1.8 lawful request, it would result in no shortfall and termination obligations being transferred to the new transferee anyway.

AT&T told aggregators to use 3.3.1.Q 4 because S&T obligations do not transfer under 2.1.8 or 3.3.1.Q4. AT&T wanted to slow down the ability to get PSE's CT 516 discount of 66%. Section 3.3.1.Q 4 required 90,000 forms signed by 15,000 end-users instead of one 2.1.8 TSA between aggregators.

(6) AT&T never replied to plaintiffs' Exhibit I of their moving brief showing AT&T using Tr.8179 against other aggregators as well despite it never having passed the FCC.

(7) AT&T never replied to moving brief at Exhibit K showing AT&T's tariff allowing many thousands of accounts to be transferred with no S&T obligations despite AT&T stating at the May 25, 2006, oral argument that "it would allow maybe only one or two".

(8) Finally AT&T has never responded to plaintiffs repeated requests to

show some examples of traffic only transfers where S&T obligations transfer. AT&T cannot because no such evidence exists.

(9) AT&T never replied to plaintiffs' moving brief, p. 17, under conclusion:

> Traffic Only – Only the accounts – the S&T obligations are customer obligations and remain with the plan as per tariff section 3.3.1 Q, bullet 10. <u>There is no option to transfer S&T obligations and keep the plan and the remaining traffic</u>.

AT&T knows that 2.1.8 only offers two options and when the DC Circuit understood that 2.1.8 allowed both entire plan as well as traffic only transfers, the DC Circuit by default answered the question, which by tariff mandates that S&T obligations do not transfer.

In Summary:

(1) Transferring of S&T obligations were "never" added to 2.1.8; applicable liabilities have nothing to do with transferring S&T obligations.

(2) The FCC utilized the obligations language of 2.1.8 to interpret & decide S&T obligations do not transfer on traffic only transfers.

(3) CCI completed the TSA's not PSE, and made the mandatory instructional notations--The District Court stated the forms were to letter of the law.

(4) AT&T's actions speak louder than words.

(5) AT&T changes positions: A) 2.1.8 does not allow traffic transfers switched to does allow traffic transfers. B) S&T obligations in minimum payment period switched to no longer in minimum payment period. C) S&T does not transfer on traffic only transfers (March 27th 2006 position) to S&T must transfer on traffic only transfers current position.

(6) All Obligations depend upon and pertain to what is transferred.

(7) AT&T's bogus theory is not commercially feasible.

(8) AT&T's counsels: Mr. Meade, Mr. Carpenter, Mr. Fash, Mr. Whitmere, Mr Friedman (author of AT&T's 2003 FCC brief), and Mr. Brown in March 2006, all clearly admit that S&T obligations do not transfer on traffic only transfers.

(9) Joint and several liability tariff language within 2.1.8E conclusively establishes that actual S&T obligations do not transfer on traffic only transfers

(10) All other issues have been adjudicated decided in plaintiffs' favor.

CONCLUSION

It is abundantly clear that AT&T has misled this Court as well as every other forum in which it has appeared. Plaintiffs' evidence clearly shows that AT&T's misrepresentations have been rewarded with 11 years of delay and a denial of justice. The evidence compels the conclusion that AT&T simply did not want to participate in the mandate placed upon it to allow its discount plans to be resold for the benefit of the American public. The Court should permit re-argument and lift the stay so this case can proceed.

Respectfully submitted,

ARLEO & DONOHUE, LLC

By: */s/ Frank P. Arleo*
Frank P. Arleo

FPA:hm
cc: Richard Brown, Esq.
Alfonse G. Inga